TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1923

No. [redacted] 133

THE KANSAS NATURAL GAS COMPANY, PLAINTIFF IN ERROR,

vs.

STATE OF KANSAS ON THE RELATION OF A. E. HELM, ATTORNEY FOR THE PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED OCTOBER 6, 1922.

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E COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 642.

NATURAL GAS COMPANY, PLAINTIFF IN ERROR,

vs.

ANSAS ON THE RELATION OF A. E. HELM, FOR THE PUBLIC UTILITIES COMMISSION ATE OF KANSAS.

THE SUPREME COURT OF THE STATE OF KANSAS.

INDEX.

LER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 7, 1923.

1 IN THE

Supreme Court of the State of Kansas.

No. 24307.

THE STATE OF KANSAS on the Relation of A. E. HELM, Attorney for the Public Utilities Commission of the State of Kansas, Plaintiff,
vs.
THE KANSAS NATURAL GAS COMPANY, Defendant.

Caption.

Be it remembered, that on the 25th day of April 1922, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, a Petition for an Alternative Writ of Mandamus, also a Motion for an Incidental Order, which Petition for an Alternative Writ of Mandamus, and Motion for an Incidental Order, are in the words and figures as follows, to-wit:

2 In the Supreme Court of the State of Kansas.

No. 24307.

[Title omitted.]

Petition and Motion for Alternative Writ of Mandamus.

[Filed Apr. 25, 1922.]

Now comes said plaintiff and for cause of action against defendant alleges:

I.

That Clyde M. Reed, H. A. Russell and Jesse W. Greenleaf are the duly appointed, qualified and acting members of the Public Utilities Commission of the State of Kansas, and as such constitute the Public Utilities Commission of the State of Kansas.

II.

That A. E. Helm is the duly appointed, qualified and acting attorney for the Public Utilities Commission of the State of Kansas.

III.

That on the 25th day of April, 1922, and prior to the filing of this petition, the said Public Utilities Commission of the State of Kansas entered an order directing that said A. E. Helm begin and prosecute an action in the Supreme Court of the State of Kan-

sas against the above named defendant, for the purpose of procuring an order from said Court directing the said defendant to reinstate and maintain in the future the rate of 35 cents per thousand cubic feet of natural gas furnished by the defendant to the distributing companies at the city gates of the cities obtaining their supply of natural gas from pipe lines of the defendant in the State of Kansas, until the defendant has obtained the consent of the Public Utilities Commission for the State of Kansas to change said rate.

3 IV.

That the said Kansas Natural Gas Company is a corporation duly organized and existing under the laws of the State of Delaware, and authorized to do business in the State of Kansas under the laws of the State of Kansas.

V.

That the Atchison Railway Light and Power Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the City of Atchison, Kansas, and its inhabitants.

VI.

That the American Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the cities of Altamont, Galena, Oswego, Columbus, Cherokee and Scammon, Kansas, and the inhabitants thereof.

VII.

That the Baldwin Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the furnishing and distribution of natural gas to the City of Baldwin, Kansas, and its inhabitants.

VIII.

That the Coffeyville Gas and Fuel Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the cities of Coffeyville and Liberty, Kansas, and the inhabitants thereof.

IX.

That the Anderson County Light and Heat Company is a corporation duly organized and authorized to do business in the

4 State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the cities of Colony and Welda, Kansas, and the inhabitants thereof.

X.

That the Tri City Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the city of Cherryvale, Kansas, and its inhabitants.

XI.

That the Edgerton Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the city of Edgerton, Kansas, and its inhabitants.

XII.

That the Gardenr Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the city of Gardner, Kansas, and its inhabitants.

XIII.

That the Kansas Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the city of Independence, Kansas, and its inhabitants.

XIV.

That the Wyandotte County Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the cities of Kansas City, Kansas, and Rosedale, Kansas, and the inhabitants thereof.

5 XV.

That the Citizens Light, Heat and Power Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the city of Lawrence, Kansas, and its inhabitants.

XVI.

That the Leavenworth Light, Heat and Power Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged

in the business of furnishing and distributing natural gas to the city of Leavenworth, Kansas, and its inhabitants.

XVII.

That the Johnson County Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the cities of Lenexa, Merriam and Shawnee, Kansas, and the inhabitants thereof.

XVIII.

That the Ottawa Gas and Electric Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the city of Ottawa, Kansas and its inhabitants.

XIX.

That the Olathe Gas and Distributing Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the furnishing and distribution of natural gas to the city of Olathe, Kansas, and its inhabitants.

XX.

That the Parsons Gas Company is a corporation duly
6 organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the cities of Parsons and Dennis, Kansas, and the inhabitants thereof.

XXI.

That the Kansas Gas and Electric Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the city of Pittsburg, Kansas, and its inhabitants.

XXII.

That the Richmond and Princeton Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the cities of Richmond, Princeton and Scipio, Kansas and the inhabitants thereof.

XXIII.

That the Kansas Farmers Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas in the city or town of South Park,, Kansas, and to its inhabitants and in the vicinity thereof.

XXIV.

That G. J. Swan, Receiver of the Consumers Light, Heat and Power Company of Topeka, Kansas, a corporation duly organized and authorized to do business in the State of Kansas, under the laws of the State of Kansas, is engaged in the business of furnishing and distributing natrual gas to the cities of Topeka and Oakland, Kansas, and the inhabitants thereof.

XXV.

That the Tonganoxie Oil and Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the busi-
7 ness of furnishing and distributing natrual gas to the cities of Tonganoxie and Reno, Kansas and the inhabitants thereof.

XXVI.

That the Baltic Operating Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natrual gas to the city of Thayer, Kansas, and its inhabitants.

XXVII.

That the Weir Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the city of Weir City, Kansas, and its inhabitants.

XXVIII.

That the Wellsville Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natrual gas to the cities of Wellsville and Le Loup, Kansas, and the inhabitants thereof.

XXIX.

That the Tyro Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the city of Tyro, Kansas, and its inhabitants.

XXX.

That the City of Chanute, Kansas, is a municipal corporation duly organized under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the said city of Chanute, Kansas, and its inhabitants.

XXXI.

That the said defendant, the Kansas Natural Gas Com-
8 pany is a public utility and is now and for more than one year last past has been engaged in the transportation and sale of natural gas to the above named distributing companies, furnishing and distributing natural gas to said cities and the inhabitants thereof in the State of Kansas.

XXXII.

That prior to about April 25, 1922, the said defendant maintained and charged a rate of 35 cents per 1,000 cubic feet of natural gas at the city gates; of said cities that said rate of 35 cents per 1,000 cubic feet of natural gas was authorized by an order of the District Court of the United States, for the District of Kansas, First Division, under date of January 20, 1920, and approved by an order of the Public Utilities Commission of the State of Kansas under date of August 18, 1920.

XXXIII.

That under date of April 1, 1922, the said defendant notified the above named distributing companies in writing that on and after the April, 1922, meter reading, said distributing companies would be charged at the rate of 40 cents per thousand cubic feet for all gas delivered to them at the town border measuring station.

That the following letter, addressed to the Consumers Light, Heat and Power Company is a copy of an identical notice which was sent by the defendant to each of said distributing companies:

"Kansas Natural Gas Company.

Bartlesville, Oklahoma, April 1, 1922.

"Consumers Light, Heat & Power Co., Topeka, Kansas.

GENTLEMEN: You are hereby notified that on and after April 1, 1922, meter reading you will be charged at the rate of forty cents per thousand cubic feet for all gas delivered to you at the town border measuring station, gas to be computed on a temperature basis of sixty degrees Fahrenheit, and a pressure basis of eight ounces atmospheric pressure, atmospheric pressure being assumed to be 14.41 pounds per square inch. Very truly yours, Kansas Natural Gas Co., By H. L. Montgomery."

9 That the April, 1922, meter reading date is April 25, 1922.

XXXIV.

That said defendant is at the time of the filing of this petition charging a rate of 40 cents per thousand cubic feet of natural gas furnished at the city gates of the *cities* of Kansas, served with natural gas by the distributing companies hereinbefore named.

XXXV.

That no application was made, presented to or filed with the Public Utilities Commission of the State of Kansas by the said defendant, the Kansas Natural Gas Company, for permission to change its rate of 35 cents per thousand cubic feet of gas at the city gates of said cities to said rate of 40 cents per thousand cubic feet of natural gas so furnished.

XXXVI.

That the Public Utilities Commission of the State of Kansas has not in any way or manner consented to, permitted or ordered the change in said rate of 35 cents per thousand cubic feet of gas, or to collect the rate of 40 cents per thousand cubic feet of natural gas so furnished to said cities.

XXXVII.

That the said defendant, the Kansas Natural Gas Company, has wrongfully and unlawfully changed the rate lawfully in effect for natural gas at the city gates of said cities without the consent of the Public Utilities Commission for the State of Kansas, and will continue to charge and collect from said distributing companies the increased rate of 40 cents per thousand cubic feet for natural gas at the city gates of said cities, unless said defendant shall be required by an order of this Honorable Court to re-establish and maintain the lawful rate of 35 cents per thousand cubic feet of natural gas at the city gates of said cities.

XXXVIII.

That said plaintiff and the distributing companies furnishing and distributing natural gas to the cities of Kansas and the inhabitants thereof, referred to herein, have no adequate remedy in the ordinary and usual course of the law to compel the defendant, the Kansas Natural Gas Company, to reestablish the lawful rate of 35 cents per thousand cubic feet of natural gas at the city gates of said cities, and to maintain the same until consent is obtained by said defendant from the Public Utilities Commission of the State of Kansas to change said rate of 35 cents per thousand cubic feet of natural gas.

Wherefore, plaintiff moves the Court and prays for an alternative writ of mandamus directed to the defendant, the Kansas Natural Gas Company, commanding said defendant to proceed forthwith to re-establish and maintain the rate of 35 cents per thousand cubic feet of natural gas furnished to said distributing companies at the city gates of said cities, until consent to change the said rate has been obtained from the Public Utilities Commission of the State of Kansas, or to show cause to this Court on or before the — day of April, 1922, why it does not do so. A. A. Helm, Attorney for Public Utilities Commission of the State of Kansas.

STATE OF KANSAS,
Shawnee County, ss:

A. E. Helm, of lawful age, being duly sworn on oath, says that he is the duly appointed, qualified and acting attorney for the Public Utilities Commission for the State of Kansas, and that he has read the foregoing petition and knows the contents thereof and that the matters therein stated are true. A. E. Helm.

Subscribed and sworn to before me this 25th day of April, 1922. Cora M. Johnson, Notary Public. My Commission expires Nov. 28, 1925.

[File endorsement omitted.]

In the Supreme Court of the State of Kansas.

No. 24307.

[Title omitted.]

Motion for an Incidental Order.

Directing the Defendant to Maintain the Rates and Service Heretofore Charged and Furnished for Natural Gas to the Distributing Companies Named in the Petition Filed Herein.

[Filed Apr. 25, 1922.]

Comes now the plaintiff in the above entitled action and shows to the Court that the defendant, the Kansas Natural Gas Company,

has served notice upon the distributing companies named in the petition filed herein, that it intends to and will shut off and discontinue the furnishing of natural gas to the distributing companies named in said petition from and after this 25th day of April, 1922, unless said distributing companies enter into an agreement with the said Kansas Natural Gas Company to pay the higher rate of 40 cents per thousand cubic feet of natural gas at the city gates. That unless the said Kansas Natural Gas Company is directed and commanded by an order of this Court to continue to furnish natural gas to said distributing companies at the rate heretofore charged at the city gates for such gas, the said Kansas Natural Gas Company will shut off and discontinue the furnishing of natural gas to said distributing companies on and after this date.

Wherefore, the plaintiff moves the Court and prays for an incidental order to be entered herein, directing and commanding the Kansas Natural Gas Company to continue to furnish natural gas to said distributing companies at the rate of 35 cents per thousand cubic feet at the city gates, and not to shut off or discontinue the furnishing of natural gas to said distributing companies, pending the final determination of the proceedings involved in the above entitled case. A. E. Helm, Attorney for the Public Utilities Commission of the State of Kansas.

12 STATE OF KANSAS,
Shawnee County, ss:

A. E. Helm, of lawful age, being duly sworn on oath, says that he is the duly appointed, qualified and acting attorney for the Public Utilities Commission for the State of Kansas, and that he has read the foregoing motion, and knows the contens thereof and that the matters therein stated are true. A. E. Helm.

Subscribed and sworn to before me this 25th day of April, 1922. D. A. Valentine, Notary Public, Clerk Supreme Court. My Commission expires —— —, ——. (Seal.)

[File endorsement omitted.]

13 Be it further remembered that on the 25th day of April, 1922, the same being one of the regular judicial days of the January, 1922, term of the Supreme Court of the State of Kansas, said court being in session in its court room in the city of Topeka, the following proceedings among others was had and remains of record in the words and figures as follows to-wit:

14 In the Supreme Court of the State of Kansas, Tuesday, April 25, 1922.

No. 24307.

[Title omitted.]

Journal Entry of Order Allowing Writ, etc.

[Filed Apr. 25, 1922.]

Now comes the plaintiff herein and presents its verified petition praying for an alternative writ of mandamus herein; and thereupon after oral argument by A. E. Helm for the petition, and by Robert D. Garver, contra it is ordered that the alternative writ of mandamus issue to the defendant as prayed for in said petition, returnable on the 1st day of May, 1922. It is further ordered that the defendant, The Kansas Natural Gas Company, be and it is hereby commanded to continue to furnish natural gas to the said distributing company at the city gates at the rate of 35¢ per thousand cubic feet, and not to discontinue the furnishing of natural gas to said distributing company pending the final determination of the issues involved in this case.

15 Be it further remembered, that on the 25th day of April 1922, there was issued by the said Supreme Court of the State of Kansas, an Alternative Writ of Mandamus, together with an Incidental order, to the defendant, which Alternative Writ of Mandamus, and Incidental Order, are in the words and figures as follows, to-wit:

16–25 In the Supreme Court of the State of Kansas.

No. 24307.

[Title omitted.]

Alternative Writ of Mandamus.

[Filed Apr. 25, 1922.]

Whereas, There has been filed in this court a petition and motion for alternative writ of mandamus in words and figures as follows, to wit:

[Omitted; printed p. 2.]

26 And it being agreeable to me that justice be speedily done in the premises, and that all lawful relief be speedily granted to the plaintiffs in this petition:

Now, therefore, you, The Kansas Natural Gas Company, are hereby commanded to proceed forthwith to reinstate and reestablish the rate of Thirty-five Cents (35¢) per thousand cubic feet at

the city gates for natural gas furnished by you to the distributing companies named in said petition, and to maintain said rate in effect until the consent of the Public Utilities Commission for the State of Kansas shall have been obtained to change the same, or that you show cause to this court on or before the 1st day of May, 1922, why you should not do so, and then and there return this writ. W. A. Johnston, Chief Justice.

Service of above Writ acknowledged for Kansas Natural Gas Co., this 25th day of April, 1922. Robert D. Garver, Attorney.

[File endorsement omitted.]

27 In the Supreme Court of the State of Kansas.

No. 24307.

[Title omitted.]

Incidental Order.

(Filed Apr. 25, 1922.)

Whereas it has been made to appear to the Court that the defendant, the Kansas Natural Gas Company, intends to and will discontinue the furnishing of natural gas to the distributing companies named in the petition filed in the above entitled case unless said distributing companies immediately enter into an agreement with the Kansas Natural Gas Company to pay the increased rate of 40 cents per thousand cubic feet of natural gas at the city gates:

It is therefore by the court ordered: That the Kansas Natural Gas Company be, and it is hereby, commanded to continue to furnish natural gas to said distributing companies at the city gates at the rate of 35 cents per thousand cubic feet, and not to discontinue the furnishing of natural gas to said distributing companies, pending the final determination of the issues involved in the above entitled case. W. A. Johnston, Chief Justice.

Service of the above entitled order is hereby acknowledged for the Kansas Natural Gas Company. By Robert D. Garver, Attorney for Defendant.

[File endorsement omitted.]

28 Be it further remembered, that afterwards and on the 1st day of May, 1922, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, a Return and Answer of the Defendant to the Alternative Writ of Mandamus, which Return and Answer, are in the words and figures as follows, to-wit.

29 In the Supreme Court of the State of Kansas.

No. 24,307.

Return and Answer of Defendant, Kansas Natural Gas Company, to Alternative Writ of Mandamus.

(Filed May 1, 1922.)

Comes now the Kansas Natural Gas Company and for its return to the alternative writ of mandamus heretofore issued in this cause, and hereto annexed, says:

I.

It admits all of the allegations of fact contained in paragraphs I to XXX, inclusive, of plaintiff's petition.

II.

It admits the facts alleged in paragraph XXXI of plaintiff's petition except the allegation that it is a public utility within the meaning of the Statutes of Kansas conferring jurisdiction over public utilities upon the Public Utilities Commission of the said State.

III.

It admits the allegations of fact contained in paragraph XXXII of plaintiff's petition, except that in the cities named in paragraphs VI, VIII, X, XIII, a rate other than thirty-five ($0.35) cents was in effect, established as alleged by plaintiff.

IV.

It admits the allegations of fact contained in paragraph XXXIII of plaintiff's petition, except that no notice was sent to companies serving the cities of Coffeyville, Cherrydale, Independence, Ottawa, Olathe, Tyro, or Chanute, and no attempt made to change the existing rates in said cities.

V.

It admits the allegations of fact contained in paragraph XXXIV of plaintiff's petition.

30 VI.

It admits the allegations of fact contained in paragraph XXXV of plaintiff's petition.

VII.

It admits the allegations of fact contained in paragraph XXXVI of plaintiff's petition.

VIII.

It denies that it has wrongfully or unlawfully changed the rate formerly charged by it for gas at the city gates of said cities, but admits that it has announced an increased rate without the consent of the Public Utilities Commission, and that it will continue to charge and collect from said distributing companies the increased rate of forty ($0.40) cents per thousand cubic feet for natural gas at the city gates of said cities unless prevented from doing so by this Honorable Court.

IX.

For answer to said alternative writ and for cause why it has not performed the things therein commanded, said Kansas Natural Gas Company respectfully represents that it is engaged in the business of buying, transporting and selling natural gas in commerce among the States of Oklahoma, Kansas and Missouri; that it maintains a pipe line running from the State of Oklahoma, across the State of Kansas, and into the State of Missouri; that for the year ending December 31st, 1921, it transported through said pipeline 11,013,408,000 cubic feet of natural gas, 7,216,718,000 cubic feet of which was produced in the State of Oklahoma and entered said pipeline in said State, the remainder thereof being produced in the State of Kansas and entering said pipeline in that State; that of the total amount of gas so transported, 5,164,121,000 cubic feet or forth-eight (48%) per cent was delivered in the State of Kansas, and 5,558,959,000 cubic feet, or fifty-two (52%) per cent was delivered in the State of Missouri; that said gas obtained in Oklahoma and in Kansas is intermingled in said pipeline and flows in a common stream from the State of Oklahoma into the State of Kansas and through the State of Kansas into the State of Missouri; that
31 said Kansas Natural Gas Company does not have a franchise from any city or town in the State of Kansas and does not operate any distributing companies, but sells gas to distributing companies at the respective city gates for an agreed price; that the figures above given for the year ending December 31st, 1921, represents an average year, insofar as showing the relative proportion of gas delivered in Kansas and Missouri, but do not correctly represent the average relative receipts of gas from Oklahoma and Kansas for the reason that during said year 1,300,000,000 cubic feet of the gas shown to have been produced in the State of Kansas was received from the Colony Field in Anderson County, Kansas, which field, at its present rate of decline, will have practically no gas available for the use of said pipeline in supplying the demand for the winter of 1922, at which time practically all of the gas supplied to

Kansas and Missouri, as shown by the 1921 figures above given, will have to be purchased in, and transported from, the State of Oklahoma.

X.

Said Kansas Natural Gas Company further alleges that its business, as above set out, constitutes commerce among the Statrs of a national character, which is not subject to regulation by the Publice Utilities Commission of the State of Kansas, and that it has the legal right to charge the several distributing companies set out in plaintiff's petition such reasonable and just rates for gas delivered to them as it may desire without the consent of the Public Utilities Commission of Kansas and without making application to said Commission for authority so to do.

XI.

Said Kansas Natural Gas Company further alleges that the rate of forty ($0.40) cents per thousand cubic feet for gas delivered to the city gates of the several distributing companies set out in plaintiff's petition is a just and reasonable rate and is necessary to be charged by said Kansas Natural Gas Company in order to secure to it a reasonable return on the value of its property used and useful in connection with the service rendered, and that a less rate would be unremunerative, non-compensatory, and confiscatory.

32 Wherefore, having fully shown cause for its acts complained of by plaintiff, defendant prays that the relief sought by plaintiff herein be denied and that the several orders issued against defendant herein be set aside and for such other and further relief as to this Honorable Court may seem just and equitable. The Kansas Natural Gas Company, By H. O. Caster, Robert D. Garver, Its Attorneys.

[File endorsement omitted.]

33 Be it further remembered, that afterwards and on the 18th day of May, 1922, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, a Stipulation of the parties to amend the Petition for an Alternative Writ of Mandamus, which Stipulation is in the words and figures as follows to-wit:

34 In the Supreme Court of the State of Kansas

No. 24307.

[Title omitted.]

Stipulation to Amend Petition.

[Filed May 18, 1922.]

It is hereby stipulated and agreed between the parties to this action that the plaintiff may amend the original petition and motion for alternative writ of mandamus filed herein, by adding at the end of Paragraph 34 the following:

Plaintiff further alleges on information and belief that said distributing companies have not entered into any contract with said Kansas Natural Gas Company, and have not consented nor agreed to pay said Kansas Natural Gas Company said forty cents (40¢) per thousand cubic feet for said natural gas so furnished at city gates of said cities; and that said companies refused to agree so to do and refuse to pay said forty cents (40¢) per thousand cubic feet for said gas until authorized so to do by the Public Utilities Commission for the State of Kansas.

It is further stipulated by the parties hereto that said amendment may be considered the same as though it had been made a part of the original petition and the alternative writ issued thereunder, and that the answer of defendant to said alternative writ may be treated as an answer to said amended petition, and further that the making of such amendment under this stipulation shall in no manner affect or change the time of hearing of the case as now assigned by the Supreme Court of the State of Kansas. A. E. Helm, Attorney for Plaintiff. H. O. Caster, Robert D. Garver, Attorneys for Defendant.

[File endorsement omitted.]

35 Be it further remembered, that afterwards and on the 3rd day of June, 1922, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, a Reply and Demurrer to the Return and Answer of the defendant, which Reply and Demurrer are in the Words and figures as follows, to-wit.

36 In the Supreme Court of the State of Kansas.

No. 24307.

[Title omitted.]

Reply and Demurrer to the Return and Answer of Defendant, Kansas Natural Gas Company, to Alternative Writ of Mandamus.

[Filed June 3, 1922.]

Comes now the plaintiff in the above entitled action and for its reply and demurrer to the return and answer of the defendant, Kansas Natural Gas Comapny, to alternative writ of mandamus, says:

I.

That it admits the allegations in Paragraph IV of said return and answer of the defendant.

II.

That it denies that defendant has not wrongfully or unlawfully charged the rate formerly charged by it for gas at the city gates of said cities as alleged in Paragraph VIII of said return and answer.

III.

That it admits the allegations in Paragraph IX of said return and answer, so far as said allegations relate to the business of the defendant in buying, transporting and selling natural gas in the states of Oklahoma, Kansas and Missouri, and the maintenance by the defendant of a pipe line running from the state of Oklahoma across the state of Kansas and into the state of Missouri, and the relative portion of gas transported and sold in the states of Kansas and Missouri, and the intermingling of the natural gas produced or obtained in Oklahoma and in Kansas, and that said gas flows in a common stream from the state of Oklahoma into the state
37 of Kansas, through the state of Kansas into the state of Missouri, and that the said Kansas Natural Gas Company does not have a franchise from any city or town in the state of Kansas and does not operate any distributing companies, but sells gas to distributing companies at the respective city gates; but plaintiff denies that said gas is sold to said distributing companies other than at the price approved by the Public Utilities Commission for the state of Kansas.

Plaintiff further alleges that the allegations in said Paragraph IX, relating to the relative receipts of gas from Oklahoma and Kansas for the year ending December 31, 1921, as compared with

the relative receipts of gas from Oklahoma and Kansas in the future, are immaterial to any issue involved in this case, and therefore constitute redundant and surplus matter, which plaintiff asks to have stricken from said return and answer.

IV.

That it denies the allegations contained in Paragraph X of said return and answer.

V.

Plaintiff demurs to the allegations contained in Paragraph XI of said return and answer for the reason that this court is without jurisdiction to determine the question of the reasonableness of the proposed 40 cents per 1,000 cubic feet of natural gas delivered to the city gates of the several distributing companies set out in plaintiffs' petition, or whether a less rate would secure to the defendant a reasonable return on the value of its property used and useful in connection with the service rendered, or whether a less rate would be unremunerative, noncompensatory and confiscatory in the absence of any showing that the defendant had made application to the Public Utilities Commission for the state of Kansas for permission to increase its rates, and that that Commission had refused to authorize the collecting by the defendant of a reasonable,
38 remunerative, compensatory and nonconfiscatory rate. A. E. Helm, Attorney for Plaintiff.

[File endorsement omitted.]

39 Be it further remembered, that afterwards and on the 7th day of June, 1922, there was filed in the office of the Clerk of the Supreme court of the State of Kansas, a Stipulation of the parties as to facts, which Stipulation is in the words and figures as follows to-wit:

40 In the Supreme Court of the State of Kansas.

No. 24307.

[Title omitted.]

Stipulation as to Facts.

[Filed June 7, 1922.]

The following facts are stipulated to be true by the parties hereunto:

It is agreed that the pipe lines of the distributing companies serving the several cities involved herein are permanently attached to and connected with the pipelines of the defendant, and that the natural gas transported and sold by the defendant moves in a con-

tinuous stream through the pipe lines of the defendant and the pipe lines of said distributing companies from the points where said gas is obtained by the defendant to the burner tips where the same is consumed and used by the customers of said distributing companies; that the only interruptions in the flow of said gas are such as are occasioned by the use of compressers pressure reduction devices and meters used for the measurement of the gas at the gates of the cities and to the customers of the several distributing companies. A. E. Helm, Attorney for Plaintiff. Robert D. Garver, Attorney for Defendant.

[File endorsement omitted.]

41 Be it further remembered, that on the 7th day of June, 1922, the same being one of the regular judicial days of the January, 1922, term of the Supreme Court of the State of Kansas, the said Supreme Court being in session in its court room in the city of Topeka, the following proceedings among others was had, and remains of record in the words and figures as follows to-wit:

42 In the Supreme Court of the State of Kansas, Wednesday, June 7, 1922.

[Title omitted.]

Journal Entry of Submission.

This cause comes on to be heard upon the pleadings filed herein; and thereupon after oral argument by A. E. Helm and J. W. Dana for the plaintiff, and by Robert D. Garver for the defendant, said cause is submitted on brief of counsel for both parties and taken under advisement by the court.

43 Be it further remembered, that afterwards and on the 8th day of July, 1922, the same being one of the regular judicial days of the July, 1922, term of the Supreme Court of the State of Kansas, said court being in session in its court room in the City of Topeka, the following proceedings among others was had and remains of record, in the words and figures as follows, to-wit:

44 In the Supreme Court of the State of Kansas, Sat., July 8, 1922.

No. 24307.

[Title omitted.]

Journal Entry of Judgment.

[Filed July 8, 1922.]

This cause comes on for decision, and thereupon it is ordered and adjudged that the demurrer of the plaintiff to the answer of the defendant be sustained. It is further ordered that the clerk of the court issue a peremptory writ of mandamus commanding the defendant to reestablish and maintain a rate of 35¢ per thousand cubic feet for gas delivered to the distributing companies operating in cities of this state, until a different rate be fixed by order of the Public Utilities Commission. It is further ordered that the defendant pay the costs of this case in this court taxed at $— and hereof let execution issue.

45 Be it further remembered that afterwards, and on the 8th day of July, 1922, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, the written opinion of the court with the syllabus attached, which opinion and syllabus is in the words and figures as follows, to-wit:

46 [Title omitted.]

Original Proceeding in Mandamus.

Writ Allowed.

Opinion.

[Filed July 8, 1922.]

Syllabus by the Court.

MARSHALL, *J.*: The State through the public utilities commission has the power to regulate the sale of natural gas in this state by fixing a reasonable price therefor where the gas is produced in Oklahoma, transported through pipe lines into this state, and here sold to distributing companies that in turn sell the gas to the consumers thereof in a large number of cities in this state.

All the justices concurring.

A true copy. Attest: —— ——, Clerk Supreme Court.

47 No. 24307.

Filed Sat., July 8, 1922.

The opinion of the court was delivered by

MARSHALL, *J.*: Plaintiff seeks to compel the defendant to re-establish and maintain a rate of thirty-five cents a thousand for gas delivered by it to distributing companies operating in a number of cities in the eastern part of the state. The defendant has filed its return and answer to the petition of the plaintiff. To that return and answer, the plaintiff has filed a combined reply and demurrer. The cause is presented on the demurrer to the answer.

The facts disclosed by the pleadings, so far as necessary to state them for the consideration of the matters presented, are as follows: The defendant is producing gas in Oklahoma and Kansas and transmitting it from Oklahoma through Kansas and into Missouri and is supplying towns and cities in Oklahoma, Kansas, and Missouri, with natural gas. The defendant does not furnish gas to the consumers; it sells gas to the distributing companies in various cities, and these companies deliver the gas to the consumers. The pipe lines conveying the gas are continuous from the wells to the place of consumption. The rate, fixed by order of the federal court and approved by the public utilities commission, has been thirty-five cents per thousand cubic feet of gas to companies distributing and selling gas in various cities in this state. That was the legal rate. On April 1, 1922, defendant notified the various distributing companies that after the April 1, 1922, meter reading, the rate charged would be forty cents per thousand cubic feet. Upon that notice being given, this action was commenced to compel the defendant to deliver gas to the distributing companies for thirty-five cents per thousand cubic feet.

The plaintiff argues—

"1. That the defendant is a public utility under the laws of Kansas, and that its business of selling natural gas, transported in interstate commerce, is subject to regulation by the Public Utilities Commission of the state of Kansas.

48 "2. That the business of selling natural gas by the defendant to the distributing companies at the gates of the cities served by said distributing companies is local and not national in character.

"3. That until congress asserts its jurisdiction over the subject and provides for the regulation of the sale of natural gas in interstate commerce, the states may enact laws providing for the reasonable regulation of the business."

The defendant contends that—

"The business of The Kansas Natural Gas Company is national in character and not subject to direct regulation by the state."

The controversy revolves around this question: Does the state of Kansas have power to regulate the price at which gas shall be sold by the defendant to the distributing companies? It is admitted by

all the parties that the business of the defendant in transporting natural gas is interstate commerce. In The State, ex rel., v. Flannelly, 96 Kan. 372, 152 Pac. 22, it was said:

"Assuming that the sale of natural gas produced in Oklahoma, from there transported into this state through pipe lines and here sold to consumers throughout the state is interstate commerce, it is not national in its nature, it does not admit of one uniform system of regulation, it is not that kind of interstate commerce which required exclusive legislation by congress, and until congress acts it is under the control of this state." (Syl. 5.)

That decision was adhered to by this court in The State, ex rel., v. Gas Co., 100 Kan. 593, 155 Pac. 1111.

Congress has not attempted to regulate the production, transportation, or sale of natural gas. Many of the states have passed laws governing these matters. The legislation by the states demonstrates that the sale of natural gas should be regulated. The regulations made are not uniform; they cannot be uniform. Regu-
49 lation is necessary; Congress has not regulated; the states must regulate. Under these circumstances regulation by the states does not violate the commerce clause of the constitution. Some other provision of the constitution may be violated, but that is an altogether different question.

In Public Utilities Comm. v. Landon, 249 U. S. 236, 245, the supreme court of the United States said:

"That the transportation of gas through pipe lines from one State to another is interstate commerce may not be doubted. Also, it is clear that as part of such commerce the receivers might sell and deliver gas so transported to local distributing companies *companies* free from unreasonable interference by the State. American Express Co. v. Iowa, 196 U. S. 133, 143; Oklahoma v. Kansas Natural Gas Co., 221 U. S. 229; Haskell v. Kansas Natural Gas Co., 224, U. S. 217.

"But in no proper sense can it be said, under the facts here disclosed, that sale and delivery of gas to their customers at burner tips by the local companies operating under special franchises constituted any part of interstate commerce."

In Penna. Gas Co., v. Pub. Service Comm., 252 U. S. 23, 28, the Supreme Court of the United States used this language:

"We think that the transmission and sale of natural gas produced in one State, transported by means of pipe lines and directly furnished to consumers in another State, is interstate commerce within the principles of the cases already determined by this court. West v. Kansas Natural Gas Co., 221 U. S. 229; Haskell v. Kansas Natural Gas Co., 224 U. S. 217; Western Union Telegraph Co. v. Foster, 247 U. S. 105.

"This case differs from Public Utilities Commission v. Landon, 249 U. S. 236, wherein we dealt with the piping of natural gas from one State to another, and its sale to independent local gas companies in the receiving State, and held that the retailing of gas by the local companies to their consumers was intrastate commerce and not a continuation of interstate commerce, although the mains of

the local companies receiving and distributing the gas to local consumers were connected permanently with those of the transmitting company. Under the circumstances set forth in that case we held that the interstate movement ended when the gas passed into the local mains; that the rates to be charged by the local companies had but an indirect effect upon interstate commerce, and, therefore, the matter was subject to local regulation."

In the last case, gas was produced in Pennsylvania, was transported through pipe lines to Jamestown, N. Y., and there was sold direct to the consumer by the producing company. There was no intervening distributing company. That case involved the validity of an order made by the public service commission of New York regulating the rates at which the Pennsylvania Gas Company should furnish gas to its customers in the city of Jamestown. The head-note to the opinion reads:

"The transmission and sale of natural gas, produced in one State and transported and furnished directly to consumers in a city of another State by means of pipe lines from the source of supply in part laid in the city streets, is interstate commerce; but, in the absence of any contrary regulation by Congress, is subject to local regulation of rates."

The only difference between the present case and the Pennsylvania Gas Company case is that here the gas is sold to distributing companies who in turn sell it to the consumer, while in the Pennsylvania Gas Company case, the gas was sold directly to the consumer. So far as the Kansas Natural Gas Company is concerned, the distributing companies in this state may be considered the consumers of the gas sold. If that is correct, there is no difference between the present case and the Pennsylvania Gas Company case.

Attention is directed to an opinion of the Honorable John C. Pollock, Judge of the United States district court for the district of Kansas, in Central Trust Company of New York v. The Central Light, Heat and Power Company, in which that court held that the business of the Kansas Natural Gas Company in selling gas to the several distributing companies within the State of Kansas is interstate commerce and is not subject to the control of the state through the public utilities commission. That opinion is largely based on Public Utilities Comm. v. Landon, 249 U. S. 236, and Penna. Gas Co. v. Pub. Service Comm., 252 U. S. 23.

This court reaches a conclusion different from that of the United States district court, based on the same cases and on the facts that Congress has not attempted to regulate the sale of natural gas and that the regulation of its sale is necessary and cannot be uniform or national in its character. Until Congress does act in the matter, the State has power to regulate the sale of natural gas in this state by the Kansas Natural Gas Company.

The demurrer of the plaintiff to the answer of the defendant is sustained; and a peremptory writ of mandamus is allowed, commanding the defendant to re-establish and maintain a rate of thirty-five cents a thousand for gas delivered by it to the distributing companies

operating in the cities of this state until a different rate in fixed by order of the public utilities commission.

All the justices concurring.

A true copy. Attest: —— ——, Clerk Supreme Court.

52 Be it further remembered: that afterwards and on the 15th day of July, 1922, the same being one of the regular judicial days of the July, 1922 term of the Supreme Court of the State of Kansas, said court being in session in its court room in the city of Topeka, the following proceedings among others was had and remains of record in the words and figures as follows, to-wit:

53 In the Supreme Court of the State of Kansas, Saturday, July 15, 1922.

No. 24307.

[Title omitted.]

Journal Entry.

[Filed July 15, 1922.]

It appearing to the court that some of the distributing companies in Kansas, receiving gas from the defendant, The Kansas Natural Gas Company are tendering payment therefor at the rate of thirty-five cents per thousand cubic feet, by checks bearing endorsements which are in effect a receipt in full for all gas received and are refusing to pay for such gas without such endorsement, and it further appearing that said Kansas Natural Gas Company has refused the acceptance of such tenders on the ground that the acceptance of the same would constitute an accord and satisfaction and would bar it from litigating its claimed legal rights, the court finds that all such distributing companies receiving gas from said Kansas Natural Gas Company should pay for the same at the rate of thirty-five cents per thousand cubic feet, which said distributing companies admit and contend to be legal rate now in effect, and that such payments should be made by said distributing companies and may be received by said Kansas Natural Gas Company without prejudice to the rights of either party to this litigation or any appeal that may be taken therefrom. And the court further finds that nothing in any order heretofore issued in this case prohibits the Kansas Natural Gas Company from using lawful means for enforcing the collection of its accounts against said distributing companies.

54 In the Supreme Court of the State of Kansas.

No. 24304.

[Title omitted.]

Clerk's Certificate.

I, D. A. Valentine, Clerk of the Supreme Court of the State of Kansas, do hereby certify that the above and foregoing is a full true and complete transcript of the record and proceedings in the above entitled case and also of the opinion of the court rendered thereon as the same appear on file and remain of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court of the State of Kansas, at my office in the city of Topeka, this 24th August, A. D. 1922. D. A. Valentine, Clerk of the Supreme Court of the State of Kansas. [Seal of the Supreme Court, State of Kansas.]

55 Here follow:

The Original Petition for a Writ of Error.

The Original Order allowing the writ of error, and fixing the amount of the Bond for Appeal.

The Original Assignments of errors.

A. Copy of the Bond for Appeal.

The Original Writ of Error.

The Original Citation, with the acknowledgment of service thereof.

56 [File endorsement omitted.]

In the Supreme Court of the State of Kansas.

No. 24,307.

[Title omitted.]

Original Proceeding in Mandamus.

Petition for the Allowance of Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Kansas.

(Filed Aug. 12, 1922.)

To the Honorable William A. Johnston, Chief Justice of the Supreme Court of the State of Kansas:

Now comes the Kansas Natural Gas Company, the above named Defendant, by its attorneys, H. O. Caster and Robert D. Garver, and respectfully shows; that heretofore, to-wit: on the 8th day of July, 1922, in the above entitled cause, final judgment was rendered against your petitioner by the Supreme Court of the State of

Kansas, that being the highest court of law or equity in the State of Kansas, in which final order and judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of your petitioner, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Petitioner further shows that a federal question was made in said case in that the Plaintiff herein, the State of Kansas, in its petition alleged that your petitioner, being engaged in the business of transporting gas by pipeline from the State of Oklahoma, through the State of Kansas, and into the State of Missouri and supplying certain distributing companies in the State of Kansas with natural gas for local distribution, was attempting to increase its city gate rate to be charged said distributing companies for said gas from the price of thirty-five cents per thousand cubic feet to the price of forty cents per thousand cubic feet, without submitting said increased rate to the Public Utilities Commission of the State of Kansas and without the approval or consent of said Public Utilities Commission and prayed for a writ of mandamus compelling your petitioner to reinstate its thirty-five cent city border rate until such time as it secured the consent and approval of the Public Utilities Commission of the State of Kansas to charge the same; upon this petition an alternative writ of mandamus was issued and served upon your petitioner, to which alternative writ of mandamus your petitioner, in due time filed its return and answer setting up that it was engaged in the purchase, production, transportation and sale of natural gas in commerce among the states of Oklahoma, Kansas and Missouri, that its business was of a national character and was not subject to direct regulation by the State of Kansas, and that its business was of such a character that direct regulation thereof could only be exercised by the Federal Congress and was not subject to the regulation attempted by the Public Utilities Commission of the State of Kansas; to
57 & 58 this return and answer of your petitioner, the State of Kansas filed its demurrer and answer and this cause was submitted to the Supreme Court of the State of Kansas upon said demurrer, which said court on the day above set out entered its final judgment, denying the right of your petitioner to charge any price for the commodity it transported in interstate commerce and sold in the State of Kansas, without first securing the approval and consent of the Public Utilities Commission of said State thereto and holding that the regulation attempted by the State of Kansas through the Public Utilities Commission by establishing the price your petitioner might charge for natural gas transported by it in interstate commerce was not repugnant to the commerce clause of the Federal Congress, vesting in Congress the right to regulate commerce with foreign nations and among the several states and that a decision of said Federal question was necessary to the judgment rendered, whereby manifest error has happened to the great damage of your petitioner.

Wherefore your petitioner prays for the allowance of a writ of

error from the Supreme Court of the United States to the Supreme Court of the State of Kansas, and the Judges thereof, to the end that the record in said matter may be removed to the Supreme Court of the United States and the error complained of by your petitioner may be examined and corrected and said judgment reversed and the writ of mandamus prayed for in said proceeding denied; and your petitioner will ever pray. Kansas Natural Gas Company, Petitioner, by H. O. Caster, Robt. D. Garver, Its Attorneys.

59 [File endorsement omitted.]

60 & 61 [File endorsement omitted.]

In the Supreme Court of the State of Kansas.

No. 24307.

[Title omitted.]

Original Proceeding in Mandamus.

Order Allowing Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Kansas.

(Filed Aug. 12, 1922.)

The above entitled matter coming on to be heard upon the petition of the Kansas Natural Gas Company, Defendant in the above entitled cause for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Kansas, and upon examination of said petition and the record in said matter, and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the question presented by the record in said matter;

It is ordered that a writ of error be and hereby is allowed to this Court from the Supreme Court of the United States and that the bond presented by said petitioner be and the same is hereby approved. W. A. Johnston, Chief Justice of the Supreme Court of the State of Kansas.

62 [File endorsement omitted.]

63 In the Supreme Court of the State of Kansas.

No. 24307.

[Title omitted.]

Original Proceeding in Mandamus.

Assignment of Errors on Writ of Error from Supreme Court of the United States to the Supreme Court of the State of Kansas.

[Filed Aug. 12, 1922.]

Now comes the Kansas Natural Gas Company, defendant in the above entitled cause and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Kansas, in the above entitled matter, there is manifest error in this, to-wit:

First.

The court erred in holding that the State of Kansas, through its Public Utilities Commission, has the power to regulate the sale of natural gas in said State by fixing the price which the Kansas Natural Gas Company might charge therefor, where the gas is produced in Oklahoma, transported through pipelines into the State of Kansas and is sold to distributing companies that in turn sell the gas to the consumers thereof in a number of cities in said State, said Kansas Natural Gas Company holding no franchises from any cities in said State and not itself engaging in the sale or distribution of the gas transported by it, other than the sale to such distributing companies.

Second.

The court erred in holding that the interstate commerce in which it found the Kansas Natural Gas Company to be engaged was subject to direct regulation by the State of Kansas.

Third.

The court erred in holding that the interstate commerce in which it found the Kansas Natural Gas Company to be engaged was not national in its nature, does not admit of one uniform system of regulation and is not that kind of interstate commerce which requires exclusive legislation by Congress. And in holding that until Congress acts, such business is under the control and regulation of the State of Kansas.

64 & 65

Fourth.

The court erred in holding that the several distributing companies to which the Kansas Natural Gas Company sells its gas are to be considered the consumers of the gas so sold, and that the Kansas Natural Gas Company is subject to the same regulation as it would be, if, under franchise granted by said respective cities, it was engaged in the distribution and sale of gas to the inhabitants of said cities, and the price which it may charge said distributing companies is subject to the same regulation as the price charged by distributing companies for the sale of gas to individual consumers at the burners' tip.

Fifth.

The court erred in sustaining the demurrer of the State of Kansas to the return and answer of the Kansas Natural Gas Company to the alternative writ of mandamus herein.

Sixth.

The court erred in allowing and issuing a peremptory writ of mandamus herein requiring the Kansas Natural Gas Company to reestablish and maintain a rate of thirty-five cents per thousand cubic feet for gas delivered it by the distributing companies in the cities of said State until a different rate is fixed by order of the Public Utilities Commission of said State.

For which errors the defendant, Kansas Natural Gas Company prays the said judgment of the Supreme Court of the State of Kansas, dated the 8th day of July, 1922, be reversed and a judgment rendered in favor of said Kansas Natural Gas Company denying the writ of mandamus prayed for herein and for costs. H. O. Caster, Rob't. D. Garver, Attorneys for the Kansas Natural Gas Company.

66 [File endorsement omitted.]

67 In the Supreme Court of the State of Kansas.

No. 24307.

[Title omitted.]

Original Proceeding in Mandamus.

Bond on Writ of Error.

[Filed Aug. 12, 1922.]

Know all men by *there* presents, that we, the Kansas Natural Gas Company, a corporation as principal and the American Surety Company of New York, as surety, are held and firmly bound unto the State

of Kansas in the sum of One Thousand ($1,000.00) Dollars, to be paid to said obligee, its representatives and assigns; to the payment of which well and truly to be made we bind ourselves, our successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this 31 day of July, A. D. 1922.

Whereas the above named, the Kansas Natural Gas Company has prosecuted a Writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Kansas.

Now, therefore the condition of this abligation is such that if the above named the Kansas Natural Gas Company shall prosecute its said writ of error to effect and answer all costs and damages if it shall fail to make good its plea; then this obligation shall be void; otherwise to remain in full force and effect. Kansas Natural Gas Company, By H. R. Straight, Vice President. Attest: L. W. Ramsey, Asst. Secretary. [Seal.] American Surety Company of New York, By J. G. Condit, Its Attorney in fact. Countersigned: W. T. Spies.

68 STATE OF OKLAHOMA,
County of Washington, ss:

On the 11th day of August, 1922, before me personally appeared H. R. Straight, to me known to be the person described in and who executed the foregoing bond and known to me to be the Vice President of the Kansas Natural Gas Company, a corporation, and acknowledged that he executed the same as the free act and deed of said corporation. G. J. Neuner, Notary Public. [Seal.] My Commission expires 5-20-23.

STATE OF OKLAHOMA,
County of Washington, ss:

On the 31st day of July, A. D. 1922, personally appeared before me, J. G. Condit, who being duly sworn deposes and says that he is attorney in fact of the American Surety Company of New York; that the seal affixed to the foregoing instrument is the corporate seal of said corporation and that the said instrument was signed and sealed on behalf of said corporation by authority of its board of Directors and the said J. G. Condit acknowledged said instrument to be the free act and deed of said corporation. Essie Travis, Notary Public. [Seal.] My Commission expires Aug. 25th, 1924.

I hereby approve the foregoing bond and sureties this 12th day of August, A. D. 1922. W. A. Johnston, Chief Justice of the Supreme Court of the State of Kansas.

[File endorsement omitted.]

69 **Writ of Error.**

(Filed Aug. 12, 1922.)

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of the plea which is in the said Supreme Court of the State of Kansas, before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between the State of Kansas on the Relation of A. E. Helm, attorney for the Public Utilities Commission, and the Kansas Natural Gas Company, wherein was drawn in question the validity of a statute of the State of Kansas, and an authority exercised under, said state, on the ground of their being repugnant to the constitution and laws of the United States, and the decision was in favor of the validity of such statute and the authority exercised thereunder; and wherein was drawn in question the construction of a clause of the constitution of the United States, and the decision was against the right, privilege and exemption specially set up and claimed under such clause of the said constitution, a manifest error hath happened to the great damage to said Kansas Natural Gas Company as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceed-

70 & 71 ings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 11th day of September, 1922, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said supreme court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Hon. William Howard Taft, Chief Justice of the said Supreme Court on the 12th day of August, in the year of our Lord, 1922. H. S. Campbell, Clerk of the District Court of the United States for the District of Kansas. [Seal of District Court U. S., District of Kansas.]

Service of within writ of error acknowledged this Aug. 12, 1922. F. S. Jackson, Attorney for Public Utilities Commission of Kansas.

72 [File endorsement omitted.]

73 & 74 [File endorsement omitted.]

Citation and Service.

(Filed Aug. 12, 1922.)

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the State of Kansas, Greeting:

You are hereby cited and admonished to appear at a Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Kansas, wherein the State of Kansas, on the relation of A. E. Helm, attorney for the Public Utilities Commission, is plaintiff, and the Kansas Natural Gas Company is defendant, to show cause, if any there be, why the judgment rendered against the said Kansas Natural Gas Company as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William A. Johnston, Chief Justice of the Supreme Court for the State of Kansas this 12th day of August, 1922. W. A. Johnston, Chief Justice of the Supreme Court of the State of Kansas.

Service of above citation acknowledged this Aug. 12, 1922. F. S. Jackson, Atty. for Public Utilities Com. for Kansas.

75 [File endorsement omitted.]

76 **Certificate of Lodgment.**

STATE OF KANSAS, *ss:*

Supreme Court.

I, D. A. Valentine, Clerk of the Supreme Court of the State of Kansas do hereby certify that there was lodged with me as such Clerk, on August 12th, 1922, in the above entitled case—

1. The Original Bond for appeal a copy of which is herein set forth, and

2. Two copies of the Writ of Error, as herein set forth one for the plaintiff and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Supreme Court of the State of Kansas, in the City of Topeka, this 24th day of August, A. D. 1922. D. A. Valentine, Clerk of the Supreme Court of the State of Kansas. [Seal of the Supreme Court, State of Kansas.]

77 **Return to Writ.**

UNITED STATES OF AMERICA, *ss:*

Supreme Court of Kansas.

In obedience to the commands of this writ, I herewith transmit to the Supreme Court of the United States a duly certived transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said Supreme Court of Kansas, this 24th day of August A. D. 1922. D. A. Valentine, Clerk of the Supreme Court of the State of Kansas. [Seal of the Supreme Court, State of Kansas.]

78 & 79 In the Supreme Court of the State of Kansas.

No. 24307.

[Title omitted.]

Order Extending Time.

Now on this 9th day of September, 1922, on application of both Plaintiff and Defendant, and for good cause shown, the time within which the Kansas Natural Gas Company may file its record on appeal herein to the Supreme Court of the United States, is hereby enlarged and extended to October 11, 1922, and the time within which appellee, the State of Kansas, is cited to enter its appearance in said Supreme Court is likewise extended. W. A. Johnston, Chief Justice Supreme Court of Kansas.

O. K. F. S. Jackson, attorney for Public Utilities Commission of the State of Kansas. Robt. D. Garver, attorney for Kansas Natural Gas Company.

80 [Endorsement omitted.]

Endorsed on cover: File No. 29,192. Kansas Supreme Court. Term No. 642. The Kansas Natural Gas Company, plaintiff in error, vs. State of Kansas on the relation of A. E. Helm, attorney for the Public Utilities Commission of the State of Kansas. Filed October 6th, 1922. File No. 29,192.

No. 133

In the Supreme Court of the United States

THE KANSAS NATURAL GAS COMPANY, *Plaintiff in Error,*

vs.

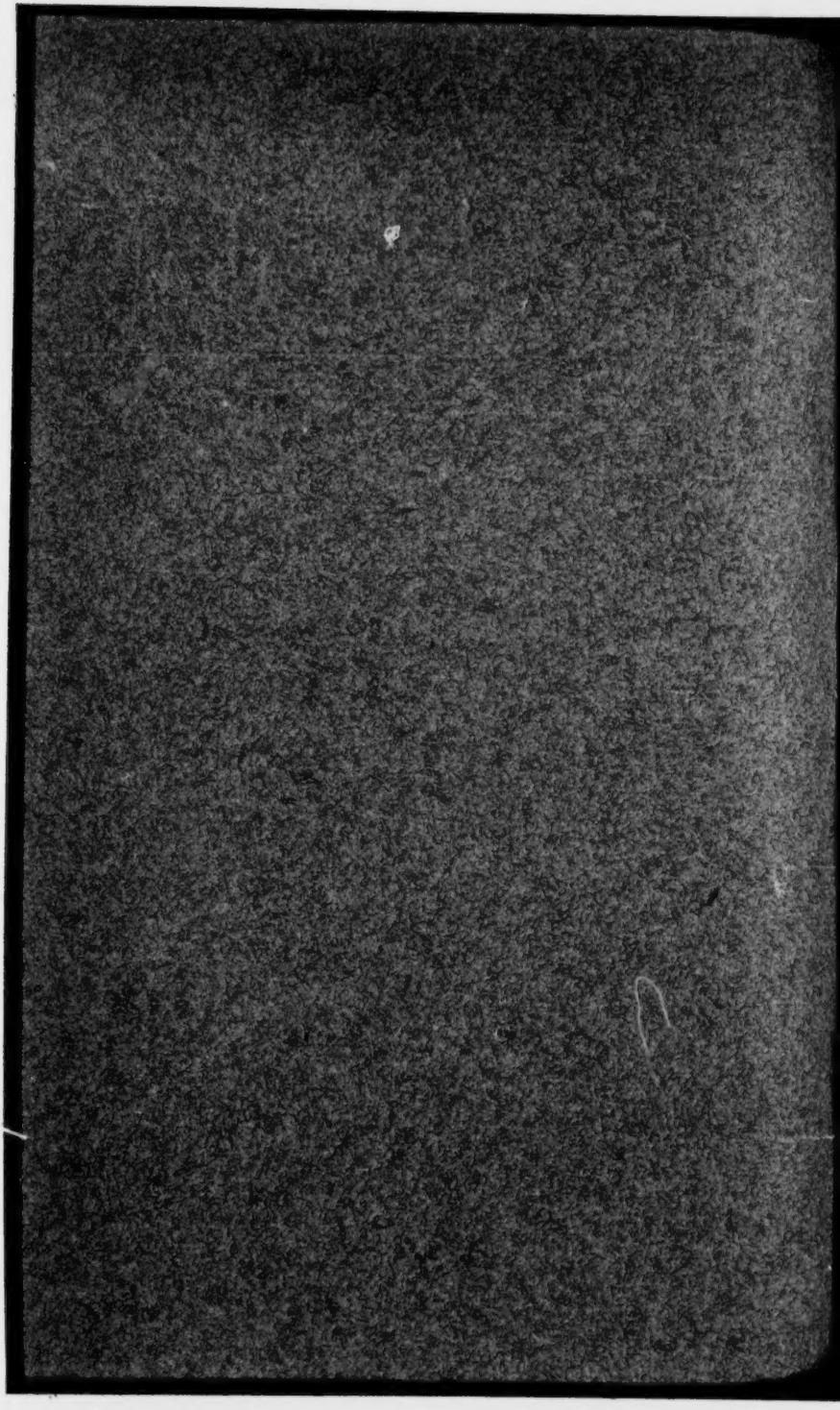
STATE OF KANSAS, on the relation of A. E. HELM, Attorney for the Public Utilities Commission of the State of Kansas.

Error from the Supreme Court of the State of Kansas.

BRIEF OF DEFENDANT IN ERROR.

FRED S. JACKSON,
Attorney for Defendant in Error.

19-1903



In the Supreme Court of the United States

THE KANSAS NATURAL GAS COMPANY, *Plaintiff in Error,*

vs.

STATE OF KANSAS, on the relation of A. E. HELM, Attorney for the Public Utilities Commission of the State of Kansas.

No. 642.

Error from the Supreme Court of the State of Kansas.

BRIEF OF DEFENDANT IN ERROR.

The brief of the plaintiff in error sufficiently presents the case without further statement. The syllabus of the state court is as follows (rec. 19):

"The state, through the Public Utilities Commission, has the power to regulate the sale of natural gas in this state by fixing a reasonable price therefor where the gas is produced in Oklahoma, transported through pipe lines into this state, and here sold to distributing companies that in turn sell the gas to the consumers thereof in a large number of cities in this state."

The question presented is identical with the one decided by this court in *Pennsylvania Gas Co. v. Public Service Commission,* 252 U. S. 23, with the exception that in that case the gas company was engaged not only in the transportation of natural gas by pipe line into the state of New York, but also in the distribution of the same to the actual consumers within the city of Jamestown, N. Y. The state of Kansas in the instant case asserts that the distinction between the two cases is not material, because in each the subject of regulation was interstate commerce, and for the further reason that while the plaintiff in error in this case is not engaged in the distribution of gas to domestic consumers within any one city, it is engaged in a service which under the laws of the state of Kansas

is a public service, and one which makes the company engaged therein a public utility subject to regulation under the public utilities statute.

The issues, therefore, may be more particularly defined as follows:

ISSUES OF LAW INVOLVED.

The defendant in error contends:

1. That the defendant is a public utility under the laws of Kansas, and that its business of selling natural gas, transported in interstate commerce, is subject to regulation by the Public Utilities Commission of the state of Kansas.

2. That the business of selling natural gas by the defendant to the distributing companies at the gates of the cities served by said distributing companies is local and not national in character.

3. That until congress asserts its jurisdiction over the subject and provides for the regulation of the sale of natural gas in interstate commerce, the states may enact laws providing for the reasonable regulation of the business.

The plaintiff in error contends:

1. That it is not a public utility under the provisions of the public-utility law of the state of Kansas, and not subject to regulation by the Public Utilities Commission for the state of Kansas.

2. That it is engaged in commerce among the states of Oklahoma, Kansas and Missouri, which is of a national character and not subject to regulation by the states.

THE GAS COMPANY IS A PUBLIC UTILITY UNDER THE LAWS OF KANSAS.

The defendant, the Kansas Natural Gas Company, is a public utility as defined in section 3, chapter 238, Laws of 1911, which declares that:

"The term 'public utility,' as used in this act, shall be construed to mean every corporation, company, individual, association of persons, their trustees, lessees or receivers, that now or hereafter may own, control, operate or manage, except for private use, any equipment, plant, generating machinery, or any part thereof for . . . *the conveyance of oil and gas through pipe lines in or through any part of the state, except pipe lines less than fifteen miles in length and not operated in connection with or for the general commercial supply of gas or oil.*"

In the case of the *City of Cimarron v. Water, Light and Ice Com-*

pany, 110 Kan. 812, reported in advance sheets for March, 1922, the court said:

"The substance of the plaintiff's principal contention may be thus stated: . . . The company in supplying the current to the city was not acting as a public utility, serving the city as one of the public whom it was under legal obligation to supply on the same terms as its other customers."

Replying to this contention the court said:

"The company, in arranging to supply the city with electricity, whether for its own use or to be distributed among its residents, was acting in its character as a public utility. It could not make a discriminatory contract with a city any more than with any other consumer."

The gas company is engaged in a public business, and is therefore subject to regulation independent of the statute. However, this statute clearly states that the term "public utility" as used in the public-utility act shall include every corporation, etc., that may own, control, operate or manage any equipment, plant, generating machinery, or any part thereof, for the conveyance of oil and gas through pipe lines in or through any part of the state. It would, therefore, seem to be definitely settled by the provisions of this statute and the decisions of the court construing the same that the defendant is a public utility under the laws of this state and is subject to regulation by the Public Utilities Commission.

THE SALE OF NATURAL GAS IS LOCAL IN ITS NATURE.

In *The State, ex rel., v. Flannelly*, 96 Kan. 372, and *The State, ex rel., v. Gas Company*, 100 Kan. 593, this court held that the business of the Kansas Natural Gas Company is not "national in its nature; it does not admit of one uniform system of regulation; it is not that kind of interstate commerce which requires exclusive legislation by Congress, and until congress acts it is under the control of the state." *North Carolina Public Service Commission v. Southern Power Company*, the United States circuit court of appeals for the fourth circuit, 282 Fed. 837, is in point in this case. The defendant was a New Jersey corporation, operating a large hydroelectric power plant in North Carolina. It furnished, delivered and sold power at the city gates of numerous cities for local distribution and sale. The local companies' rates were regulated by the North Carolina corporation commission.* The supply company notified the distributing companies of an increase in rates and threatened to shut off the current if the rates were not promptly paid. The court held

that the supply company was a public-service corporation, doing business affected with the public interest, and that it could not increase its city-gate rates to the local distributing companies without the order and approval of the state corporation commission.

THE RATES CHARGED BY THE GAS COMPANY TO THE DISTRIBUTING COMPANIES AT THE GATES OF THE CITIES ARE SUBJECT TO REGULATION BY THE PUBLIC UTILITIES COMMISSION.

The power of the Public Utilities Commission to regulate the rates charged for natural gas transported from one state to another and sold in the latter state has been the subject of frequent litigation recently. The history of the litigation of the *Pennsylvania Gas Company v. The Public Service Commission of New York* affords the most recent and the fullest discussion of the power of the commission to regulate the sale of natural gas transported in interstate commerce. Natural gas was produced in the state of Pennsylvania and transported by pipe lines by the Pennsylvania Gas Company to the city of Jamestown, N. Y., where it was sold directly from the distributing pipe lines of the gas company to consumers. Complaint was made to the public-service commission by a consumer, claiming that the rates charged were excessive, and asking that the same be reduced by order of the commission. The public-service commission held that:

"The fact that natural gas is brought in from another state does not, in the absence of congressional action, deprive a New York commission of jurisdiction to fix a proper rate to be charged therefor." (P. U. R. 1917F, 611.)

At a special term of the New York supreme court, upon application of the gas company for a writ of prohibition to restrain the commission from the exercise of jurisdiction beyond its power, the court held that:

"A state public-service commission has no power to fix the price of natural gas sold by a citizen of another state to a citizen within the state, since this is interstate commerce; and it is immaterial that congress has never legislated upon the subject."

This decision was reversed by the supreme court, appellate division, third department (184 App. Div. 556, 171 N. Y. Supp. 1028). An appeal was taken from the latter decision to the New York court of appeals (*Re Penn. Gas Co.*, 225 N. Y. 397, 122 N. E. 260). The case is also reported in P. U. R. 1919C, 663. The court of appeals, in affirming the order of the supreme court, appellate division, held:

1. "The transportation of gas from one state to another and the sale in one state for consumption in another is interstate commerce."
2. "In the absence of congressional action, a state may regulate the price of gas sold within its borders, although transported from another state."

The decision of the New York court of appeals was affirmed by the supreme court of the United States in *Pennsylvania Gas Co. v. Public Service Commission*, 252 U. S. 23, 64 L. Ed. 434. The decision by the New York court of appeals, *Re Pennsylvania Gas Company*, supra, contains a full and complete discussion of former decisions and the principles of law applicable to the case. No excerpt from the decision will adequately present the holdings of the commission. We are, therefore, for the convenience of the court, setting out in this brief the opinion in full, which is as follows:

"CARDOZO, J.: The Pennsylvania Gas Company is a Pennsylvania corporation which supplies natural gas to the inhabitants of the city of Jamestown. Its gas fields and wells are in Pennsylvania, and its gas is conveyed to Jamestown through pipe lines. About forty-five miles of line are in Pennsylvania and about five in New York. It has a branch office in Jamestown, and its mains and pipes are in the city's streets. Formerly its rates for gas were 30 cents a thousand. Recently it attempted to raise its rates to 35 cents, and filed a schedule with the public-service commission accordingly. A citizen of Jamestown, alleging that the new rates were exorbitant, lodged a complaint with the commission. The gas company was directed to answer the complaint. It filed with the commission a demurrer to the jurisdiction, which the commission overruled. Thereupon the company sued out a writ of prohibition. Its petition alleges that the attempted regulation of its rates is an unconstitutional interference with interstate commerce. The writ was granted at special term (102 Misc. 37, P. U. R. 1918D, 501, 169 N. Y. Supp. 820) and vacated at the appellate division (184 App. Div. 556, 171 N. Y. Supp. 1028). An appeal to this court followed.

"(1) 1. We think the petitioner's business is 'interstate commerce.' There is no doubt that the transportation of oil or gas from state to state through the medium of pipe lines is commerce between the states. *West v. Kansas Natural Gas Co.*, 221 U. S. 229, 55 L. Ed. 716, 35 L. R. A., n. s., 1193, 31 Sup. Ct. Rep. 564; *Haskell v. Kansas Natural Gas Co.*, 224 U. S. 217, 56 L. Ed. 738, 32 Sup. Ct. Rep. 442; *Haskell v. Cowham*, 109 C. C. A. 235, 187 Fed. 403. It is true that there is a distinction to be noted. What is regulated by this statute (Public Service Commissions Law [Consol. Laws, chap. 48], par. 65) is not the act of transportation; it is the sale of the thing transported (*Manufacturers' Light & Heat Co. v. Ott*, [D. C.] 215 Fed. 940, 944). But the sale of commodities to be delivered by the seller in one state to the buyer in another is also interstate commerce. *Leisy v. Hardin*, 135 U. S. 100, 34 L. Ed. 128,

3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Savage v. Jones*, 225 U. S. 501, 56 L. Ed. 1182, 32 Sup. Ct. Rep. 715; *International Paper Co. v. Massachusetts*, 246 U. S. 135, 62 L. Ed. 624, 38 Sup. Ct. Rep. 292, Ann. Cas. 1918C, 617. It is therefore subject, like the business of transportation, to the power of the nation.

"Interstate commerce does not end until the subject matter of the sale has been broken up or redistributed or absorbed in the common mass of property within the state. *Leisy v. Hardin*, supra. When that moment arrives is not always easy to determine. The test to be applied will vary with the method of transportation and the subject of the sale. The keg of beer transported from one state to another is withdrawn from interstate commerce when its contents are sold by the glass. (Ibid.) Tobacco, imported in bulk, becomes subject to the plenary power of the states when the bulk is broken and the tobacco sold at retail. *Rast v. Van Deman & L. Co.*, 240 U. S. 342, 362, 60 L. Ed. 679, 688, L. R. A. 1917A, 421, 36 Sup. Ct. Rep. 370, Ann Cas. 1917B, 455; *Armour & Co. v. North Dakota*, 240 U. S. 510, 517, 60 L. Ed. 771, 776, 36 Sup. Ct. Rep. 440, Ann. Cas. 1916D, 548. But the rule of the 'original package' is not an ultimate principle. It is an illustration of a principle. It assumes transmission in packages, and then supplies a test of the unity of the transaction. If other forms of transmission are employed there is need of other tests. *Mutual Film Corp. v. Industrial Commission*, 236 U. S. 230, 241, 59 L. Ed. 552, 558, 35 Sup. Ct. Rep. 387, Ann. Cas. 1916C, 296, *Hall v. Geiger-Jones Co.*, 242 U. S. 539, 558, 61 L. Ed. 480, 492, L. R. A. 1917F, 514, 37 Sup. Ct. Rep. 217, Ann. Cas. 1917C, 643. The telegram forwarded by the stock exchange in New York to the telegraph company in Boston, with the intention that the company shall transmit it to selected brokers, approved in advance by the exchange, does not lose its character as a subject of interstate commerce until it reaches the brokers' offices. *Western U. Teleg. Co. v. Foster*, 247 U. S. 105, 62 L. Ed. 1006, 1 A. L. R. 1278, P. U. R. 1918D, 865, 38 Sup. Ct. Rep. 438. The continuity of the transaction is not broken by the translation of the code message into English, by its transmission, thus translated, to subscribers, or even by the option reserved by the telegraph company to refuse delivery to anyone. (Ibid.) The law does not ask itself what the parties 'may' do, but what, in the normal course of business, it is expected that they 'will' do. 'If the normal, contemplated and followed course is a transmission as continuous and rapid as science can make it from exchange to broker's office, it does not matter what are the stages or how little they are secured by covenant or bond.' *Western U. Teleg. Co. v. Foster*, supra, 247 U. S. at page 113. The essential unity of the transaction remains the final test. *Swift & Co. v. United States*, 196 U. S. 375, 399, 49 L. Ed. 518, 525, 25 Sup. Ct. Rep. 276; *Rearick v. Pennsylvania*, 203 U. S. 507, 512, 51 L. Ed. 295, 297, 27 Sup. Ct. Rep. 159.

"Subjected to that test, the transactions of the petitioner's business have the unity and directness of interstate commerce. There

is no break in the continuity of the transmission from pumping station in Pennsylvania to home and office and factory in Jamestown. A different question would arise if gas transmitted from Pennsylvania should be stored in reservoirs in New York, and then distributed to consumers as their needs might afterwards develop. The quantity stored or the period of storage might require us to hold that interstate commerce was at an end when the place of storage had been reached. *Kehrer v. Steward*, 197 U. S. 60, 65, 49 L. Ed. 663, 666, 25 Sup. Ct. Rep. 403; *Brown v. Houston*, 114 U. S. 622, 29 L. Ed. 257, 5 Sup. Ct. Rep. 1091. The transactions would then be similar to those common in the oil business. We do not now determine the rule that should govern them. It is enough to hold that where there is in substance no storage, but merely transmission for immediate or practically immediate use, direct from seller to consumer, interstate commerce does not end till the gas has reached its goal. That, by the fair intendment of the petition, is the business conducted by this petitioner. It is not important that consumers do not signify in advance the precise amount that they will need. If their wants are approximately known, and the gas is transmitted, not to be held, but to be used, so that any storage that results is merely casual and incidental, the transaction is to be treated as single and continuous. We must then say, in the language of Holmes, J., in *Western U. Teleg. Co. v. Foster*, supra, that the transmission is 'as continuous and rapid as science can make it.'

"(2) 2. The question remains whether, in default of action by congress, the attempted regulation is within the police power of the state.

"The petitioner is a public-service corporation. Its rates are subject to regulation by 'some' agency of government. Congress has never occupied the field of regulation, as it has done with railroads, the telegraph and telephone lines, and even the oil companies. Act to Regulate Commerce, as amended June 29, 1906 (chap. 3591, 34 Stat. at L. 584, Comp. Stat. 1916, par. 8563), and June 18, 1910 (chap. 309, 36 Stat. at L. 539). Gas and water companies are expressly excepted. In such circumstances there is no implied exclusion of the police power of the states. The exercise of that power is, indeed, subject to conditions. It must not impose upon interstate commerce burdens new and direct rather than remote and incidental. *Leisy v. Hardin*, supra; Minnesota Rate Cases (*Simpson v. Shepard*), 230 U. S. 352, 396, 400, 57 L. Ed. 1511, 1540, 1541, 48 L. R. A., n. s., 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18. It must not discriminate against foreign products. *Brimmer v. Rebman*, 138 U. S. 78, 35 L. Ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213; Minnesota Rate Cases, *supra*, 230 U. S. at page 401. It must not introduce diversity and conflict where there is need of uniformity and harmony. *Cooley v. Port Wardens*, 12 How. 299, 319, 13 L. Ed. 996, 1004; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. Ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 38 L. Ed. 962, 4 Inters.

Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Minnesota Rate Cases, *supra*, 230 U. S. at page 400. But, subject to those conditions, the police power of the state survives, though the transactions brought within its grip are those of interstate commerce. Matters peculiarly of local concern are not 'left to the unrestrained will of individuals because congress has not acted.' Minnesota Rate Cases, *supra*, 230 U. S. at page 402. 'Our system of government is a practical adjustment by which the national authority as conferred by the constitution is maintained in its full scope without unnecessary loss of local efficiency.' Minnesota Rate Cases, *supra*. No general formula can tell us in advance where the line is to be drawn. 'We have no second Laplace, and we never shall have, with his Mechanique Politique, able to define and describe the orbit of each sphere in our political system with such exact mathematical precision.' Daniel Webster, in *Bank of Augusta v. Earle*, 13 Pet. 519, 559, 10 L. Ed. 274, 293, quoted by Henderson, 'The Position of Foreign Corporations in American Constitutional Law,' p. 117.

"We think the line must be drawn here so as to bring the attempted regulation within the power of the state. It is important to keep before us just what the state has tried to do. The rule is stated in paragraph 65 of the public-service commission law: 'Every gas corporation, every electrical corporation and every municipality shall furnish and provide such service, instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable. All charges made or demanded by any such gas corporation, electrical corporation or municipality for gas, electricity or any service rendered or to be rendered, shall be just and reasonable and not more than allowed by law or by order of the commission having jurisdiction. Every unjust or unreasonable charge made or demanded for gas, electricity or any such service, or in connection therewith, or in excess of that allowed by law or by the order of the commission is prohibited.'

"This gas company occupies the streets of Jamestown with its mains. Even without any statute, it would be under a duty to furnish gas to the public at fair and reasonable rates. The statute might be repealed, and still the courts would have the power, if exorbitant charges were made, to give relief to the consumer. 1 Wyman, Pub. Serv. Corp., §§ 111, 113; *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 408, 32 L. Ed. 979, 984, 6 Sup. Ct. Rep. 553; *Armour Packing Co. v. Edison Electric Illuminating Co.*, 115 App. Div. 51, 100 N. Y. Supp. 605; *Shepard v. Milwaukee Gaslight Co.*, 6 Wis. 539, 70 Am. Dec. 479. The state in the adoption of this law has not imposed a new burden. It has not created a new duty. It has given a new 'sanction' to 'an inherent duty.' *Western U. Teleg. Co. v. Commercial Mill Co.*, 218 U. S. 406, 416, 54 L. Ed. 1088, 1091, 36 L. R. A., n. s., 220, 31 Sup. Ct. Rep. 59, 21 Ann. Cas. 815. It has established a new administrative agency the better to ascertain and declare and enforce a duty already existing. We cannot doubt that the creation of such an agency is within the power of the state until

congress shall manifest the purpose to override its action. *Western U. Teleg. Co. v. Commercial Mill Co.*, supra; *Missouri K. & T. R. Co. v. Harris*, 234 U. S. 412, 58 L. Ed. 1377; L. R. A. 1915E, 942; 34 Sup. Ct. Rep. 790; *Southern R. Co. v. Reid*, 222 U. S. 424, 437, 56 L. Ed. 257, 260, 32 Sup. Ct. Rep. 140; *Missouri P. R. Co. v. Larrabee Flour Mills Co.*, 211 U. S. 612, 623, 53 L. Ed. 352, 361, 29 Sup. Ct. Rep. 214; *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 43 L. Ed. 702, 19 Sup. Ct. Rep. 465; *New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628, 41 L. Ed. 853, 17 Sup. Ct. Rep. 418; *Chicago, R. I. & P. R. Co. v. Arkansas*, 219 U. S. 453, 55 L. Ed. 290, 31 Sup. Ct. Rep. 275; *International & G. N. R. Co. v. Anderson County*, 246 U. S. 424, 62 L. Ed. 807, 38 Sup. Ct. Rep. 370. Nothing to the contrary was held in *Western U. Teleg. Co. v. Foster*, supra. There is a twofold distinction. The regulation there condemned was one that affected telegraph companies in a field already occupied by the statutes of the nation (Act to Regulate Commerce, as amended June 18, 1910), and it imposed a new duty instead of enforcing an old one (247 U. S. at page 114, 62 L. Ed. 1016, P. U. R. 1918D, 865, 38 Sup. Ct. Rep. 438).

"In thus holding, we do not forget that the state, in the exercise of its police power, must not introduce diversity and conflict in spheres where there is need of uniformity and harmony. That is the reason why, irrespective of any occupation of the field by congress, it may not fix the rates of interstate transportation. It may not do this, even though it confines its action to that part of the interstate journey within its own limits. The law in that respect has been undoubted since the decision in *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. Ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4. A statute of Illinois prescribed that there should be no greater charge for a short haul than for a long one. In condemning the statute the court emphasized the need of uniform regulation. If each state prescribed different rates for different portions of the trip the result would be chaos. Again, in the Covington Bridge Case (*Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 38 L. Ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087) the decision had a like basis. A bridge lay between two states. One state attempted to fix a charge. The court said that if one state could fix one charge the other could fix another, and again the result would be chaos. On the other hand, the question was left open whether the two states, in default of action by congress, might establish a joint tariff (154 U. S. at page 222). These cases are taken as typical of many others. The principle back of them has been often stated. 'As to those subjects which require a general system or uniformity of regulation the power of congress is exclusive.' Minnesota Rate Cases (*Simpson v. Shepard*), supra, 230 U. S. at page 399, 57 L. Ed. 1541, 48 L. R. A., n. s., 1151, 33 Sup. Ct. Rep. 740, Ann. Cas. 1916A, 18. As to 'other matters, admitting of diversity of treatment according to the special require-

ments of local conditions,' there is a reserved power in the states, subject, in its exercise, to the overriding power of the nation. 'Inaction of congress upon these subjects of a local nature or operation, unlike its inaction upon matters affecting all the states and requiring uniformity of regulation,' is not a denial, but a concession, of the power of the vicinage. *Mobile County v. Kimball*, 102 U. S. 691, 699, 26 L. Ed. 238, 240; *Parkersburg & O. River Transp. Co. v. Parkersburg*, 107 U. S. 691, 703, 27 L. Ed. 584, 589, 2 Sup. Ct. Rep. 732. Familiar illustrations are regulations of the fees of pilots (*Cooley v. Port Wardens*, 12 How. 299, 319, 13 L. Ed. 996, 1004), charges for the use of wharves (*Parkersburg & O. River Transp. Co. v. Parkersburg*, supra; Minnesota Rate Cases, *supra*, 230 U. S. at page 405, 57 L. Ed. 1544, 48 L. R. A., n. s., 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18), and tolls for the use of natural waterways which have been artificially improved (*Sands v. Manistee River Improv. Co.*, 123 U. S. 288, 31 L. Ed. 149, 8 Sup. Ct. Rep. 113). *Dicta* may, indeed, be quoted where the court, in sustaining police regulations, has observed, as if by way of contrast, that they did not involve the regulation of rates. *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 42 L. Ed. 688, 18 Sup. Ct. Rep. 289; *Western U. Teleg. Co. v. Commercial Mill Co.*, supra, 218 U. S. 418, 54 L. Ed. 1092, 36 L. R. A., n. s., 220, 31 Sup. Ct. Rep. 59, 21 Ann. Cas. 815. But in every case the rates in view were rates of transportation. That is a field where regulation, if there is to be any, must be uniform. A central authority must reconcile the clashing action of localities. What is within the police power of one state is equally in such circumstances within the police power of its neighbor. One cannot freely exercise its will without affecting at the same time the like freedom of another. In the phrase of Hobbes, there is need of 'a common power to keep them in awe.'

"We deal here with a different situation. There is here no regulation of transportation. *Manufacturers Light & Heat Co. v. Ott*, (D. C.) 215 Fed. 940, 944. There is no regulation of a duty owing equally to two states. There is regulation of a duty owing to one of them alone. The seller of most things has the right to sell at whatever price he will. This petitioner has lost that right by the acceptance of a public franchise in consideration of a public service. *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 408, 32 L. Ed. 979, 984, 9 Sup. Ct. Rep. 553; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.*, 115 U. S. 650, 29 L. Ed. 516, 6 Sup. Ct. Rep. 252; *Shepard v. Milwaukee Gas Co.*, 6 Wis. 539, 70 Am. Dec. 479. The service is due to the state from which the privilege proceeds. Until congress shall intervene it is therefore the police power of New York that controls the sale of gas to consumers in New York. There is no division of the power between New York and Pennsylvania. There is no more a division of power than when we regulate our fees for wharfage or our tolls for artificial waterways. In these matters protection of our own inhabitants is a duty that is ours and no one else's. The power may be displaced; but until

displaced, it is undivided. Here, then, is the decisive distinction between the regulation of the price of gas and that of rates of transportation. There is no room for conflict of authority for clashing regulations. The statute has a sphere of operation that is not national, but local. *Cooley v. Port Wardens*, supra. It is idle to speak of the need of uniformity of action by states of equal competence when there is only one state whose action is involved. But even within the state, diversity rather than uniformity is exacted by the conditions of the business. Rates adequate in one city are inadequate in another. The local needs are best known to local agencies of government. No central authority, acting for the nation as a whole, will readily discern them.

"The case comes, then, to this: We have a sale of a single commodity. We have a preëxisting duty to sell it at fair rates. We have a transaction on where conflicting regulations by the states are impossible, for the public duties regulated are fulfilled in one state only. We have a statute which declares a duty that would exist without it, and establishes a new agency of government to insure obedience. The silence of congress cannot be interpreted as a declaration that public-service corporations, serving the needs of the locality, may charge anything they please. *Mobile County v. Kimball* and *Parkersburg & O. River Transp. Co. v. Parkersburg*, supra; *Covington Bridge Case*, supra, 154 U. S. 222, 38 L. Ed. 970, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087. The local regulation stands until congress occupies the field.

The supreme court of the United States, in *Pennsylvania Gas Company v. Public Service Commission*, supra, in affirming the decision of the court of appeals of New York said:

"The principles announced, often reiterated in the decisions of this court, were applied in the judgment affirmed by the court of appeals of New York, and we agree with that court that until the subject matter is regulated by congressional action the exercise of authority conferred by the state upon the public-service commission is not violative of the commerce clause of the federal constitution."

It is contended that the sale of the gas to the local distributing companies ends the interstate character of the commerce involved. That, however, is not to say that the interstate commerce, if it ends at the city gates, is not subject to regulation by the state. The supreme court, in the Pennsylvania case, has expressly held that the state may regulate the sale of natural gas in interstate commerce where it is of a local nature. The sale of natural gas by the defendant to the distributing companies in no way differs from the sale by that company to cities, industries or large consumers of gas. In either case it is interstate commerce of a local nature which has not been regulated by congress, and the principles of law which

are applied to the interstate commerce at the burners' tips in the Pennsylvania case are equally applicable to the sale of gas measured by the flow meters to the distributing companies in Kansas. The business of selling such gas to the distributing companies is as much local in its character as is the sale of the gas to consumers in the various cities. The price of such gas may reasonably vary with the different local conditions, such as the distance from the producing wells, etc.

While it may, therefore, be conceded that the sale of natural gas transported from other states into Kansas and intermingled with gas produced from wells in Kansas is interstate commerce, it nevertheless is subject to regulation in the absence of any action on the subject by congress.

We are unable to distinguish any difference in the application of the principles of law announced in the Pennsylvania case applicable to sale in interstate commerce at the burners' tips from the principles of law which must necessarily be applied to the sale of the same character of commerce to distributing companies, industries and other large consumers. In the Cimarron case, *supra*, the state supreme court held that the sale of electric current to a city to be distributed among its inhabitants was subject to regulation. There is no difference in principle between that case and this case. If the Public Utilities Commission can regulate the sale of wholesale electric current to cities or distributing companies it can also regulate the wholesale rates of natural gas sold to such distributing companies. The fact that the sale of natural gas at the city gates is part of interstate commerce of a local character does not prevent the Public Utilities Commission from regulating the rates at which the gas is sold.

The state supreme court in the cases cited herein hold that: (1) The Kansas Natural Gas Company is a public utility subject to the regulation of the Public Utilities Commission; (2) that natural gas transported from one state to another is interstate commerce; (3) that such commerce is local in its nature; (4) it does not admit of one uniform system of regulation; (5) it is not that kind of interstate commerce which requires exclusive legislation by congress; (6) that until congress acts it is under the control of the state; (7) that "where the subject is peculiarly one of local concern and from its nature belongs to the class with which the state appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals

because congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the federal power"; (8) that "it may be conceded that the local rates may affect the interstate business of the company, but this fact does not prevent the state from making local regulation of a reasonable character"; (9) that "such regulations are always subject to the exercise of authority by congress, enabling it to exert its superior power under the commerce clause of the constitution."

We respectfully submit that the gas pipe lines should not be permitted to occupy a twilight zone of nonregulation because congress refused to take jurisdiction of them as it did the oil pipe lines. This of itself was a legislative finding that the transportation and sale of gas for domestic use was of a local nature, and one which did not naturally fall within the powers of congress. We think this case fully demonstrates the correctness of this legislative finding. The supreme court of Kansas, in the Winfield case considered by this court at this session, has found that the connection of a number of local companies with this pipe-line company is sufficient to affect the interests and conditions surrounding each of the companies. For these reasons, the judgment of the supreme court of Kansas should be affirmed. Respectfully submitted,

FRED S. JACKSON,
Attorney for Defendant in Error.

□

No. 642. 133

In the Supreme Court of the United States

October Term, 1922.

THE KANSAS NATURAL GAS COMPANY,
Plaintiff in Error,

vs.

STATE OF KANSAS on the relation of A. E. Helm, Attorney for the Public Utilities Commission of the State of Kansas, *Defendant in Error.*

BRIEF OF PLAINTIFF IN ERROR.

H. O. CASTER and
ROBERT D. GARVER,
Attorneys and Counsel for Plaintiff in Error.

SMITH-GRIEVES, LAW PRINTERS, KANSAS CITY, MO.

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Appendix.

List of Cases.

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STATE OF KANSAS on the relation of A. E. Helm, Attorney for the Public Utilities Commission of the State of Kansas, *Defendant in Error.*

BRIEF OF PLAINTIFF IN ERROR.

No. 642.

STATEMENT.

This is a proceeding in error to the Supreme Court of Kansas for deciding adversely to Plaintiff in Error the issues raised by the demurrer of the State to the return and answer of Plaintiff in Error to an alternative writ of mandamus issued by said Supreme Court.

Under date of April 1st, 1922, the Plaintiff in Error sent out a written notice to all distributing companies being supplied with gas by it as follows:

> "You are hereby notified that on and after April 1, 1922, meter reading you will be charged at the rate of forty cents per thousand cubic feet for all gas delivered to you at the town border measuring station, gas to be computed on a temperature basis of sixty degrees Fahrenheit, and a pressure basis of eight ounces atmospheric pressure, atmospheric pressure being assumed to be 14.41 pounds per square inch."

On April 25th, 1922, the State of Kansas, through its Public Utilities Commission filed this proceeding in the Supreme Court of Kansas, alleging that Plaintiff in Error was engaged in the business of supplying gas to the various distributing companies named in its petition and that it was, pursuant to the notice above quoted, attempting to charge and collect from said distributing companies a city gate rate of forty cents per M cubic feet, the same being an increase of five cents per M cubic feet over the rate previously charged, without submitting such increased rate to the Public Utilities Commission of the State of Kansas and without having secured the consent of such Commission thereto.

To the alternative writ of mandamus issued on the petition of the State this Plaintiff in Error filed its return and answer in which it alleged the character of the business being carried on by

it; that it was charging a rate without having submitted the same to the Public Utilities Commission and without having secured its approval thereto; and in which it asserted that it was engaged in interstate commerce of a national character not subject to direct regulation by said State. To this return the State of Kansas filed its demurrer which demurrer was sustained by the Supreme Court of Kansas and a peremptory writ of mandamus allowed. The facts alleged in the return are admitted by the demurrer and are briefly as follows:

Plaintiff in Error is engaged in the business of buying, transporting and selling natural gas in commerce among the States of Oklahoma, Kansas and Missouri; that it maintains a pipeline running from the State of Oklahoma, across the State of Kansas and into the State of Missouri; that for the year ending December 31st, 1921, it transported through said pipeline 11,013,408,000 cubic feet of natural gas, 7,216,718,000 cubic feet of which was produced in the State of Oklahoma and entered said pipeline in said State and 3,796,690,000 cubic feet of which was produced in the State of Kansas and entered said pipeline in that State; that the total amount of gas so transported, 5,164,121,000 cubic feet was delivered in the State of Kansas, and 5,558,959,000 cubic feet was delivered in the State of Missouri; that the gas obtained in Oklahoma and in Kansas is intermingled in said pipeline and flows in a common stream from the State of Oklahoma into the State of Kansas and through the State of

Kansas into the State of Missouri; that Plaintiff in Error does not have a franchise from any city or town in the State of Kansas and does not operate any distributing companies but sells gas to distributing companies at the respective city gates for an agreed price. That the figures above given for the year ending December 31st, 1921, represent an average year insofar as showing the relative proportion of gas delivered in Kansas and Missouri; but do not correctly represent the average relative receipts of gas from Oklahoma and Kansas for the reason that during said year 1,300,000,000 cubic feet of gas was received from the Colony field in Anderson County, Kansas, which field at the present rate of decline will have practically no gas available for the use of said pipeline in supplying the demand for the winter of 1922 at which time practically all the gas supplied to Kansas and Missouri as shown by the 1921 figures above given will have to be purchased in and transported from the State of Oklahoma; that its business as above set out constitutes commerce among the States of a national character which is not subject to regulation by the Public Utilities Commission of the State of Kansas and that it has the legal right to charge the several distributing companies set out in Plaintiff's petition such reasonable and just rates for gas delivered to them as it may desire without the consent of the Public Utilities Commission of Kansas and without making application to said Commission for authority so to do; that the rate of forty cents per thousand cubic feet for gas

delivered at the city gates of the several distributing companies set out in Plaintiff's petition is a just and reasonable rate and is necessary to be charged in order to secure to said Kansas Natural Gas Company a reasonable return on the value of its property used and useful in connection with the service rendered and that a less rate would be unremunerative, non-compensatory and confiscatory. The petition of the State of Kansas appears at page 1 of the transcript of record and the return to the alternative writ of mandamus appears at page 12.

The legal question to be determined by this Court on the return of Plaintiff in Error to the alternative writ of mandamus, admitted by the demurrer of the State, is whether or not the Plaintiff in Error has the legal right without the consent of the Public Utilities Commission of the State of Kansas to establish such reasonable rates as may be necessary to earn a fair return on its property.

SPECIFICATION OF ERRORS.

First: The court erred in holding that the State of Kansas, through its Public Utilities Commission, has the power to regulate the sale of natural gas in said State by fixing the price which the Kansas Natural Gas Company might charge therefor, where the gas is produced in Oklahoma, transported through the pipelines into the State of Kansas and is sold to distributing companies that in turn sell the gas to the consumers thereof in a number of cities in said State, said Kansas Natural Gas Company holding no franchises from any cities in said State and not itself engaging in the sale or distribution of the gas transported by it, other than the sale to such distributing companies.

Second: The court erred in holding that the interstate commerce in which it found the Kansas Natural Gas Company to be engaged was subject to direct regulation by the State of Kansas.

Third: The court erred in holding that the interstate commerce in which it found the Kansas Natural Gas Company to be engaged was not national in its nature, does not admit of one uniform system of regulation and is not that kind of interstate commerce which requires exclusive legislation by Congress. And in holding that un-

til Congress acts, such business is under the control and regulation of the State of Kansas.

Fourth: The court erred in holding that the several distributing companies to which the Kansas Natural Gas Company sells its gas are to be considered the consumers of the gas so old, and that the Kansas Natural Gas Company is subject to the same regulation as it would be, if, under franchise granted by said respective cities, it was engaged in the distribution and sale of gas to the inhabitants of said cities, and the price which it may charge said distributing companies is subject to the same regulation as the price charged by distributing companies for the sale of gas to individual consumers at the burners' tip.

Fifth: The court erred in sustaining the demurrer of the State of Kansas to the return and answer of the Kansas Natural Gas Company to the alternative writ of mandamus herein.

Sixth: The court erred in allowing and issuing a peremptory writ of mandamus herein requiring the Kansas Natural Gas Company to reestablish and maintain a rate of thirty-five cents per thousand cubic feet for gas delivered by it to the distributing companies in the cities of said State until a different rate is fixed by order of the Public Utilities Commission of said State.

BRIEF OF ARGUMENT.

The six specifications of error will all be discussed together as they are all directed toward one proposition which is:

Proposition.

The business carried on by Kansas Natural Gas Company as set out in its return and answer to the alternative writ of mandamus is interstate commerce of a national character which cannot be directly regulated by the State.

In our discussion of the above proposition as a correct statement of the law, we will first state the applicable law as heretofore settled by the decisions of this court.

I.

The business of transporting gas by pipeline from one State into another is interstate commerce. *Public Utilities Commission* v. *Landon*, 249 U. S. 236, 63 L. E. 577. *Pennsylvania Gas Company* v. *Public Service Commission*, 252 U. S., 23, 64 L. E. 434

> "That the transportation of gas through pipelines from one State to another is interstate commerce may not be doubted." *Public Utilities Commission* v. *Landon, supra.*

II.

The States cannot directly regulate or burden interstate commerce. Minnesota rate cases, 230 U. S. 332. *Public Utilities Commission* v. *Landon, supra. Pennsylvania Gas Company* v. *Public Service Commission, supra.*

> "The principle which determines this classification underlies the doctrine that the States cannot, under any guise, impose direct burdens upon interstate commerce. For this is but to hold that the States are not permitted directly to regulate or restrain that which, from its nature, should be under the control of the one authority, and be free from restriction, save as it is governed in the manner that the national legislature constitutionally ordains."
>
> Minnesota rate cases, *supra.*

In the Pennsylvania Gas Company case, *supra,* this court in applying the above rule to the transportation of gas by pipeline from one State to another, said,

> "The general principle is well established and often asserted in the decisions of this court that the State may not directly regulate or burden interstate commerce."

III.

The States may pass laws indirectly affecting interstate commerce when needed to regulate or protect matters of local interest. Minnesota rate

cases, *supra; Pennsylvania Gas Company* v. *Public Service Commission, supra.*

The rule is thus stated in the Minnesota rate cases:

> "But within these limitations there necessarily remains to the States until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction, although interstate commerce may be affected."

In the Pennsylvania Gas Company case the same principle was thus stated:

> "In dealing with interstate commerce it is not, in some instances, regarded as an infringement upon the authority delegated to Congress, to permit the States to pass laws indirectly affecting such commerce, when needed to protect or regulate matters of local interest."

It is unnecessary to burden the Court with any discussion of the proposition that the business carried on by Plaintiff in Error is interstate commerce or that interstate commerce cannot be directly regulated or burdened by the State. Both of these propositions are admitted by the State and are too well established to require more than the citation of the above cases. It is also admitted by Plaintiff in Error that the State can indirectly regulate interstate commerce in matters local in their nature. It appears, therefore, that

all the abstract legal principles involved are agreed upon by Plaintiff and Defendant in Error. The agreement of the parties as to the law vanishes only when the law is attempted to be applied to the undisputed facts. It is contended by the State that the establishment of the price for which Plaintiff in Error shall sell its product is local in its nature and is neither a direct regulation nor an unreasonable interference. The State recognizes the law as laid down by this court in the Landon case as follows:

> "That the transportation of gas through pipelines from one State to another is interstate commerce may not be doubted; also it is clear that as part of such commerce, the receivers might sell and deliver gas so transported to local distributing companies, free from unreasonable interference by the State."

It admits that the Plaintiff in Error

> "Might sell and deliver gas so transported to local distributing companies free from unreasonable interference by the State,"

but says the fixing of the price which it shall charge is not unreasonable. It justifies its position by the decision of this court in the Pennsylvania Gas Company case wherein it is said:

> "In dealing with interstate commerce it is not, in some instances, regarded as an infringement upon the authority delegated to Congress, to permit the States to pass laws indirectly affecting such commerce, when

needed to protect or regulate matters of local interest"

and

"This local service is not of that character which requires general and uniform regulation of rates by congressional action, and which has always been held beyond the power of the States although Congress has not legislated upon the subject."

It says in affect that its regulation is indirect and that it concerns a matter of local service.

Our discussion, will, therefore, be confined to these two propositions.

Is the Attempted Regulation Indirect Only?

This court to our knowledge has never attempted to define direct or indirect regulation and in the nature of things no hard and fast rule can obtain, but each case must be determined upon its own facts.

Plaintiff in Error is engaged in the business of transporting gas for sale. It is difficult to conjecture any article of interstate commerce which is not being transported for sale or any person engaged in such commerce whose purpose is not to sell the article so transported. The sale "among the States" is the purpose of the commerce and the returns from the sale the incentive for engaging in it. Plaintiff in Error has no purpose in transporting gas other than to sell it. The sale

of gas is the business in which it is engaged. The transportation is incidental only. The pipeline is merely a means of delivery. If the pipeline in question was not owned by Plaintiff in Error and its business was transacted by delivering gas in Oklahoma to a common carrier for transportation to its several distributing company customers in Kansas, the situation would not be different in principle. If regulation of the price which Plaintiff in Error may charge for its product is not a direct regulation, what, may we ask, would constitute a direct regulation? What else is there connected with the business that remains if the sale is eliminated? Other than the sale, what is there upon which a direct regulation might attach? If this is indirect regulation, counsel for the State must suggest what might constitute a direct regulation, for we are unable to conceive it. The Kansas Natural Gas Company stands in no different position than any other company supplying a different kind of fuel to the public. Coal is as much used for fuel as gas and yet it would not be contended that the company transporting coal in interstate commerce could be compelled by a State to sell to one not agreeable to it or at a price not acceptable. Fuel oil shipped in tank cars is in as common use as gas and yet the State has not undertaken to establish its price. Gas is as much a fuel as either of the above and there is no apparent difference in principle unless it can be said that the mere fact that gas is transported in a pipeline (the only way it is possible to transport it) places it in a class by itself and gives it a

status it would not have if the transportation could be made in tanks.

If regulation of the price which Plaintiff in Error may charge for its product is subject to direct regulation, or if the attempted regulation is not direct but indirect only, then the decision in both the Landon and Pennsylvania Gas Company cases are wrong in principle and fallacious in their reasoning.

In the Landon case, *supra*, the business under consideration was the business of Kansas Natural Gas Company, this Plaintiff in Error, then in the hands of a receiver, and the facts were the same as in the case at bar with the exception that gas was supplied to the several local distributing companies under an arrangement whereby this company received for its gas a proportional part of the price collected by the distributing companies from the consumers. It was contended by the receivers that the gas continued in interstate commerce under this arrangement until it reached the burners' tips on the theory that the distributing companies acted as agents for the transportation company, and on this theory it was contended that the rates of the distributing companies were free from regulation by the states. This Court refused to accept the theory of agency and held that the interstate character of the gas was lost when it was delivered to and entered into the mains of the local company. In regard to this feature of the case the court said:

> "The thing which the receivers actually did was to deliver supplies to local companies.

> Exercising franchise rights, the latter distributed and sold the commodity so obtained upon their own account, and paid the receivers what amounted to two-thirds of their receipts from customers. Interstate movement ended when the gas passed into local mains."

As the orders complained of in the Landon case affected merely the rates to be charged by the distributing companies to their consumers and only indirectly affected the price to be received by the receivers, the court denied the relief sought.

> "The challenged orders related directly to prices of gas at burners' tips, and only indirectly to the receivers' business. They were under no compulsion to accept unremunerative prices; even the original supply contracts had not been adopted and was subject to rejection."

> "That the transportation of gas through pipelines from one state to another is interstate commerce may not be doubted; also it is clear that as part of such commerce the receivers might sell and deliver gas so transported to local distributing companies, free from unreasonable interference by the state."

If in the Landon case the Court had understood the law to be that the regulation of the price to be charged by the transportation company was permissible the above reasoning would clearly not have been employed and the Court would have so stated the rule instead of placing the case within an exception to the rule. At that time the arrange-

ment between the transportation company and the distributing companies was purely a voluntary one and not governed or attempted to be regulated by any order of the State Commission. The Court called attention to this by stating that the supply contracts were subject to rejection, and that the receivers were under no compulsion to accept unremunerative prices. The whole decision is based upon the fact that the Commission was undertaking to regulate the prices charged by the distributing companies and not the prices charged by the receivers, and that the business of the receivers was only indirectly affected. The situation in the case at bar is the reverse of the Landon case. Here there is no question of the rates to be charged locally by distributing companies and such rates are not affected except incidentally and in the same manner that the rate of any public utility may be affected by the price it has to pay for its materials and supplies. The question here is whether or not the business of transporting and selling gas in interstate commerce by a company operating under no franchise and undertaking no distribution or supply to consumers, is subject to direct regulation by the State. We believe the decision in the Landon case clearly supports our contention that the State has no such power. If this were not so it would have been entirely unnecessary in that case for the Court to decide where interstate movement ended; that the distributing companies were not agencies of the transporting company; or that the orders complained of only indirectly affected the price which the transporting company might

charge—that is, interstate commerce. All the court need have said was that the regulation of all gas charges was not direct and was permissible.

The facts in the Pennsylvania Gas Company case differ from those in the Landon case in that in the latter case the distributing companies received their gas from the transporting company, while in the Pennsylvania Gas Company case the company which transported the gas from without the state itself engaged in its distribution. In the announced principles there is no difference in the two cases and one goes no farther than the other. It was held in the Landon case that the matter of the rates to be charged by a distributing company was a matter of local interest which the state could regulate; that such rates only indirectly affected the transporting company, and that the latter could not complain of the orders made as a regulation of interstate commerce.

The Pennsylvania Gas Company case announces the same principle of law and merely enlarges the former statement by adding that it is immaterial whether the distributing company purchases its gas from a transportation company or is itself the transporting company. In other words, that the price charged consumers is a matter of local interest, only indirectly affecting interstate commerce, and can be regulated by the state whether the gas sold consumers is a part of an uninterrupted interstate movement or not. No other question was in that case. In its opinion, the court said:

> "The thing which the State Commission has undertaken to regulate, while part of an inter-

> state transmission, is local in its nature, and pertains to the furnishing of natural gas to local consumers within the city of Jamestown, in the state of New York. The pipes which reach the customers served are supplied with gas directly from the main of the company which brings it into the state; nevertheless, the service rendered is essentially local, and the sale of gas is by the company to local consumers, who are reached by the use of the streets of the city in which the pipes are laid, and through which the gas is conducted to factories and residences as it is required for use. The service is similar to that of a local plant furnishing gas to consumers in a city. * * * While the manner in which the business is conducted is part of interstate commerce, its regulation in the distribution of gas to the local consumers is required in the public interest, and has not been attempted under the superior authority of Congress. * * *
>
> It may be conceded that the local rates may affect the interstate business of the company. But this fact does not prevent the state from making local regulations of a reasonable character."

The foregoing quotation shows clearly that the only regulation attempted, or which was involved in the Pennsylvania case, was a regulation of consumers' rates. In speaking of its decision in the Landon case in the course of the opinion in the Pennsylvania case, the court said: "The rates to be charged by the local companies had but an indirect effect upon interstate commerce, and, therefore, the matter was subject to local regulation."

In applying the law to the case before it, the court said in effect the same thing, as appears in the paragraph last above quoted. In neither case was there before the court any question other than the power of the state to regulate the rates to be charged to consumers by companies operating under franchises and engaged in a purely public service.

Both cases held that the fixing of consumers' rates at the burners' tips only indirectly affected the transportation, or interstate commerce end of the business, and the cases were ruled on this reasoning. Had the right existed to directly regulate interstate commerce the court would have so stated the law and these cases would have been goperned by the rule and not by an exception to a rule.

The attempted regulation is a direct regulation of interstate commerce, never heretofore sanctioned by any decision of this Court.

Is the Attempted Regulation One Permissible as "Needed to Protect or Regulate Matters of Local Interest"?

We have heretofore stated that neither the Landon case nor Pennsylvania Gas Company case would have been reasoned as they were if the regulation of the price for which a gas company engaged in interstate commerce might sell its product constituted an indirect regulation and not a

direct one. We say also that they would not have been so reasoned if the regulation of such sale price was in the power of the states as a matter of local interest. The cases would have been decided by so stating the rule, and it would have been unnecessary in either case to have carefully drawn the line between the sale by the transporting company to the distributing company and the sale by the distributing company to its consumers. The reason for, and the purpose of, this distinction between the two classes of business would fall, if the rule of law is the same as to each.

Had the rule been the same the court would not have said in the Landon case, "The challenged orders related to price of gas at burners' tips and only indirectly to the receivers' business. They were under no compulsion to receive unremunerative prices, even the original supply contracts had not been adopted and were subject to rejection." Nor would it have been said in the Pennsylvania Gas Company case, "While the manner in which the business is conducted is part of interstate commerce, its regulation in the distribution of gas to the local consumers is required in the public interest, and has not been attempted under the superior authority of Congress." * * *

"It may be conceded that the local rates may affect the interstate business of the company, but this fact does not prevent the state from making local regulations of a reasonable character."

The two cases above discussed are determinative of the propositions that rates to consumers are a

matter of local interest. They are also determinative of the proposition that rates charged by distributing companies to their consumers are so indirectly connected with or dependent upon the price charged such distributing companies for gas as to only indirectly affect interstate commerce and to give the transporting company no reason for objection on the ground that state regulation of the one unreasonably burdened the other. This should eliminate from the case at bar any contention on the part of the State that its right of control grows out of the fact that the price the transporting company may charge will be passed on by the distributing company to the consumer and thereby become a matter of local interest. The State has no more interest in the price charged the distributing companies than the transporting company has in the price allowed the distributing companies by the State. As stated in both of the above cases, these two rates are related and one affected by the other, but such relation is too indirect to be taken into consideration. Every artificial gas plant, every light plant, is dependent upon coal. The price of coal to each such plant is reflected in the rate it must charge its consumers. Yet in no such case has any regulation ever been thought of or attempted. Neither the Landon nor the Pennsylvania Gas Company case was decided by this Court upon any theory that a state could fix the price at which the transportation company might sell its product, but each carefully distinguished and excepted the case from a general rule applicable to

such sales, which Justice Hughes thus stated in the Minnesota rate cases:

> "The principle which determines this classification underlies the doctrine that the states cannot, under any guise, impose direct burdens upon interstate commerce."

We have heretofore stated that if the fixing of the price which Plaintiff in Error may charge for its product is an indirect regulation we are unable to conceive what a direct regulation would be. We now stated that if the business carried on by the Plaintiff in Error is local in its nature, we are unable to conceive what a business would be which is not local in its nature. The business of Plaintiff in Error does not involve merely the transportation of gas from a point outside the State of Kansas to a point within such state. Its business is much broader and more comprehensive. It includes the purchasing and transporting of gas in volumes sufficient to meet the requirements of the twenty-six distributing companies set out in the original petition of the State herein. In addition to the gas transported into and sold in Kansas, a greater amount is transported and sold in the State of Missouri. Assuming the principle contended for by the State, that is, that in the absence of Federal regulation a state may directly regulate the rates to be charged for gas sold in interstate commerce of a local nature, one is confronted with the inquiry, "What is interstate commerce of a local nature?" Is the Kansas Natural engaged in local interstate commerce? We do not know what may

be meant by interstate commerce of a local nature, but if the term is susceptible of definition it surely could not include transportation over parts of three states and the sale of gas to a large number of distributing companies located in different parts thereof. If this is interstate commerce of a local nature, then under what circumstances is interstate commerce not local? Justice Hughes in writing the opinion of this Court in the Minnesota rate cases stated the principles applicable to the regulation of interstate commerce in terms so clear, plain and concise as to evidence the intention to state the principles fully and leave nothing to be added thereto. It is significant that in this decision no reference is made to "interstate commerce of a local nature," or any attempt made to classify interstate commerce as local or otherwise. Nor is it asserted in that decision that with respect to interstate commerce the states under any circumstances have the power of direct legislation. All that was held in that decision or in any other decision of this Court to which our attention has been called is as stated in the Pennsylvania Gas Company case that the states may "pass laws indirectly affecting such commerce, when needed to protect or regulate matters of local interest."

The Kansas Natural Gas Company is not holding itself out as either a common carrier or a public service corporation and is in fact neither. It is selling gas to such customers as it desires and recognizes no obligation to supply the public generally or to continue the supply to its present customers beyond such time as is agreeable to

it. And yet, if it is engaged in such a business as gives the State control and regulation, it can be required to sell to such parties as the State may direct, where the State may direct, as well as at such price as the State may direct. While no such power has yet been attempted by the State, the statute under which its commission is operating gives it the one power as clearly as the other.

That the business carried on by Plaintiff in Error is not a matter of local interest but is national in character and does not lend itself to regulation by the several states is apparent when the affect of conflicting rates in the three states through which its pipeline passes is considered. There can be no question that gas purchased in Oklahoma is more valuable when transported to the State of Kansas or to the State of Missouri and should demand a better price in those States, not only to compensate the transporting company for the expense of transportation but as a matter of fairness to the several communities involved. The State of Oklahoma might establish one rate for gas delivered to the gates of its cities, the State of Kansas another rate and the State of Missouri still another, the result of which might be that the Defendant would be compelled to sell its product in the State of Missouri for a less price than it received in the State of Oklahoma where the gas was produced.

As a further illustration of what might result from attempted local regulation we might suggest that the laws under which the Commissions of

the several states operate are entirely different and it may be developed that in some of the states the Commission may have no authority whatever over gas rates in certain cities and that the fixing of rates therein is a matter for the city itself. It is our understanding at this time that there has been submitted to this court a case in which the power of the Commission to fix rates for companies operating exclusively in one city is questioned (Winfield). If it should be determined that in this state or in Missouri or Oklahoma, the power to fix rates in certain cities belongs to the cities themselves, this defendant might be confronted with such a conflict of rates from one end of its line to the other, as would work a great injustice to it as well as an inequitable discrimination among the several companies served.

The matter of service is perhaps of more importance than the matter of rates. The public generally would rather pay a high price for good service, than a low price for poor service. Gas shortages in times of greatest demand have brought about more public discontent and condemnation that any matter of rates to be charged, and service in the nature of an adequate supply at all times is of the most vital interest to the public. The regulation of public utilities in respect to service is as clearly within the power of the state as the regulation of rates, and is as often exercised. In many instances rates are based on service and penalties and forfeiture are applied in the event pressure is not maintained, so that

it would become the duty of this defendant, not only as a matter of policy and good business, but as a matter of law, to give service. It operates a pipe line of a known capacity and through it can be transported just so much gas, and no more. If that entire capacity is now required to supply the demands of the present customers of the defendant in Oklahoma, Kansas and Missouri, what must result in the event the Commission of either of these states should order gas furnished to other cities, distributing companies or industries? If such an order should come from Oklahoma, the supply of gas for Kansas and Missouri would be decreased accordingly. A like order from Kansas would make it impossible to supply the demands of Missouri. Not only would defendant be unable to give service, but it would forfeit a large percentage of the price for the gas it had actually sold by reason of the failure of service.

The Decision of the Supreme Court of Kansas.

The Supreme Court of Kansas in its opinion herein has held that the business transacted by the Plaintiff in Error as shown by the facts alleged in its return to the alternative writ of mandamus is subject to regulation by the State and bases its opinion largely upon the authority of the Pennsylvania Gas Company case. The conclusion reached by Justice Marshall in his opinion would be correct if the premise upon which it is founded were true. In comparing the

case at bar with the Pennsylvania Gas Company case Justice Marshall correctly notes that the only difference in facts is that in the case at bar the Plaintiff in Error sells gas to distributing companies, where as in the Pennsylvania Gas Company case the transporting company and the distributing company were both owned by the Pennsylvania Gas Company. Justice Marshall then states, "so far as the Kansas Natural Gas Company is concerned the distributing companies in this State may be considered the consumers of the gas sold." If this is true, it naturally follows that one case cannot be distinguished from the other and the decision of the Kansas Supreme Court is correct on the authority of the Pennsylvania Gas Company case. We, however, most earnestly contend that the distributing companies to which the Kansas Natural sells its gas are not to be considered as consumers of the gas sold. As a matter of fact, they are not consumers at all, but are merchants who purchase the product of the Kansas Natural Gas Company for resale. The true facts were correctly stated by this court in the Landon case wherein it is said "the thing which the Receivers actually did was to deliver supplies to local companies. Exercising franchise rights, the latter distributed and sold the commodity so obtained upon their own account, and paid the Receivers what amounted to two-thirds of their receipts from customers. Interstate movement ended when the gas passed into local mains."

The notice of April 1st, 1922 which was served by Plaintiff in Error upon the distributing companies supplied by it in both Kansas and Missouri, resulted in three seperate proceedings being commenced to contest its right to change the existing city gate rate and establish a new rate without the consent of the Public Utilities Commission in Kansas and the Public Service Commission in Missouri. The Public Utilities Commission of Kansas instituted this proceeding before the Supreme Court of Kansas. The Public Service Commission of Missouri instituted a proceeding in the United States District Court for the Western Division of the Western District of Missouri, in which it sought to enjoin the collection of the increased charge, that proceeding being entitled "State of Missouri on the relation of Jesse W. Barrett, Attorney General of the State of Missouri and Public Service Commission of the State of Missouri, Complainant vs. Kansas Natural Gas Company, a corporation, Defendant, No. 361 in equity." The third proceeding was instituted by G. J. Swan, Receiver of the Consumers Light, Heat and Power Company in the case of Central Trust Company of New York vs. the Consumers Light, Heat and Power Company, case No. 74 N in equity in the District Court of the United States for the District of Kansas, First Division, in which proceeding the State of Kansas intervened, setting up the facts alleged in its original petition herein, and asked that the Kansas Natural Gas Company be enjoined from collecting the proposed rate until

the approval of the Pubic Utilities Commission of the State of Kansas had been secured. In each of these three cases the question was squarely presented as to the jurisdiction of the States of Kansas and Missouri through their respective Commissions over the business being carried on by Plaintiff in Error. The cases before the Federal Court in the Western Division of the Western District of Missouri and the District of Kansas, First Division, were both decided in favor of the Kansas Natural Gas Company, each of said Courts holding that the business being transacted by it was not subject to regulation in the manner attempted by the respective States. The opinion of the United States District Court for the District of Kansas, First Division, was written by Judge John C. Pollock and is reported in 282 Fed., page 680. The decision of the United States District Court for the Western Division of the Western District of Missouri was delivered by Judge Arba S. Van Valkenburgh, and is reported in 282 Fed., page 341. The opinions of these two distinguished jurists in themselves constitute a brief for Plaintiff in Error herein and the same are hereto appended in full.

It is respectfully submitted that the judgment of the Supreme Court of the State of Kansas should be reversed with direction to that Court to deny the relief herein sought by the State of Kansas.

H. O. CASTER and
ROBERT D. GARVER,
Attorneys and Counsel for Plaintiff in Error.

APPENDIX.

In the District Court of the United States for the Western Division of the Western District of Missouri.

State of Missouri, on the Relation of Jesse W. Barrett, Attorney-General of the State of Missouri, and Public Service Commission of the State of Missouri, Complainants,

vs In Equity No. 361

Kansas Natural Gas Company, a corporation, Defendant.

In Equity. Suit by State of Missouri on Relation of Attorney General and Public Service Commission against Kansas Natural Gas Company. The Kansas City Gas Company, intervener. Decree for defendant.

Jesse W. Barrett, Attorney-General of Missouri, and R. Perry Spencer, General Counsel, and James D. Lindsay, Assistant General-Counsel of the Public Service Commission, all of Jefferson City, Missouri, for the complainant.

H. O. Caster and R. D. Garver, both of Bartlesville, Oklahoma, and Richard J. Higgins, of Kansas City, Missouri, for the defendant.

J. W. Dana, of Kansas City, Missouri, for the intervener, the Kansas City Gas Company.

Van Valkenburgh, District Judge (orally): Complainant, the State of Missouri, on the relation of the Attorney-General of the State,

and the Public Service Commission of the State, filed a bill of complaint against the Kansas Natural Gas Company praying a permanent injunction against said company, to restrain it from increasing the price of gas sold by it to local distributing companies in the state, to the extent of five cents per thousand cubic feet, over the rates heretofore in effect, without first procuring the consent and approval of the Public Service Commission. Such increase of five cents per thousand cubic feet, the Kansas Natural Gas Company has informed the distributing companies, would be effective after the so-called April Meter Readings of 1922. The Kansas Natural Gas Company also advised the distributing companies that unless they complied with the rates announced and fixed by them, they would discontinue supplying gas to the distributing companies. The Kansas City Gas Company, which purchases gas from the Kansas Natural and distributes such gas so purchased at Kansas City, filed its intervening petition herein and asked, among other things, the same relief as that prayed by complainant.

The Defendant filed answers to the bill of complaint and the intervening bill, in which answers it asserts that it is engaged in the transportation of gas from the State of Oklahoma into and through the State of Kansas and into the State of Missouri; that such gas is sold by it in Kansas and Missouri, and that, therefore, its businesss is interstate commerce, and as such, is free from the regulation herein sought to be imposed. The three parties, complainant, intervener and de-

fendant, have executed and filed an agreed statement of facts, which is supplemented by evidence of a documentary nature, introduced by complainant and intervener. The facts thus established in so far as they may be necessary to a decision of the points in controversy, are hereinafter sufficiently disclosed. Upon the record thus made, the cause is presented for final hearing upon the application for permanent injunction against the Kansas Natural Gas Company from raising its rate five cents per thousand cubic feet at the gates of the cities, on the ground that the company has submitted itself, either directly or impliedly to the jurisdiction of the Public Service Commission, and that it has no right to raise that rate without first applying to the Commission, and then only subject to its orders with a right to review the Commission's findings, on the ground that the same are confiscatory and unreasonable.

The whole question has been submitted to the court upon one proposition, *i. e.*, the power of the Commission respecting this application.

The cases chiefly relied upon are the Landon case and the so-called Pennsylvania case, in the 249 U. S., at page 236, and 252 U. S., at page 23. The Landon case concerned itself entirely with the question of whether the right existed in the receivers of the Kansas Natural Gas Company to enjoin the utilities commissions and the municipalities from interfering with a raise of rates by a local distributing company; that was the real issue in that case. The Supreme Court had occasion to advert to some other principles involved,

and the case becomes important, principally from that standpoint. The court said that the transportation and sale of gas through pipelines from one State to another is interstate commerce, and that as a part of such commerce, the receivers might sell and deliver gas so transported to local distributing companies, "free from unreasonable interference by the State;" they were under no compulsion to accept an unremunerative price.

It has been stated and shown with respect to those conditional contracts, that conditions have been so materially changed that it is at least a matter of doubt, if not conclusively established, that those contracts as such are no longer binding as to the terms imposed by them.

Some question is raised here as to what is meant by the expression "free from unreasonable interference by the State."

In the Pennsylvania Gas case, the court had to do with the gas company as a distributing agent. There, gas was distributed directly to the consumers in different cities and localities therein mentioned, by the pipeline company, and the court held that when that was the situation the company came under the regulating power of the State, because what was done was a local intrastate business, and not interstate commerce, to which reference had been made in the Landon case; and they had occasion to differentiate the Landon case from the Pennsylvania case, which was then before the court; and it is not without significance that in deciding a question which came clearly within the local power, control and regulation of the State, it

should have been thought necessary by the Supreme Court to point out the difference existing between the different classes of commerce, interstate as against intrastate.

The court says:

> "We think that the transmission and sale of natural gas produced in one State, transported by means of pipelines and directly furnished to consumers in another State, is interstate commerce within the principles of the cases already determined by this court."

So we are left with no doubt as to the fact that this conclusively establishes that the transportation of natural gas from one State to another is interstate commerce, and that far we have no difficulty in reaching a final conclusion.

The court further said:

> "The general principle is well established, and often asserted, that the State may not directly regulate or burden interstate commerce. That subject, so far as legislative regulation is concerned, has been committed by the Constitution to the control of the Federal Congress. But while admitting this general principle, it, like others of a general nature, is subject to qualifications not inconsistent with the general rule, which now are as well established as the principle itself. * * * In varying forms, this subject has frequently been before this court. The previous cases were fully reviewed and deductions made therefrom in the Minnesota Rate Cases, 230 U. S. 352."

Now, it is significant that the court places the application of this principle upon the same basis as in the case of railroad regulation and transportation; so that we may have some light thrown upon the question by referring to the principles applicable to such cases. The Minnesota Rate Cases, of course, very exhaustively clear up the entire subject, and it is unnecessary to go to any other decided cases, in order to learn what the principles involved are, and to learn where the line of demarcation falls.

After stating the limitations, it was said in the Minnesota Rate Cases (page 402):

> "But within these limitations there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial juisdiction although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by State legislation from the foundation of the Government because of the necessity that they should not remain unregulated and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction, but rather that the States should continue to supply the needed rules until Congress should decide to supersede them.

Further, it is competent for a State to govern its internal commerce, to provide local improvements, to create and regulate local facilities, to adopt protective measures of a reasonable character in the interest of the health, safety, morals and welfare of its people, although interstate commerce may incidentally or indirectly be involved. Our system of government is a practical adjustment by which the National authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the State appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our Constitutional system has thus been made possible."

Now, in the Pennsylvania Gas Case, 252 U. S., at page 30-31, the court said:

"The rates of gas companies transmitting gas in interstate commerce are not only not

regulated by Congress, but the Interstate Commerce Commission Act expressly withholds the subjects from Federal control.

The thing which the State Commission has undertaken to regulate, while part of an interstate transmission, is local in its nature, and pertains to the furnishing of natural gas to local consumers within the city of Jamestown in the State of New York. The pipes which reach the customers served are supplied with gas directly from the main of the company which brings it into the State, nevertheless the service rendered is essentially local, and the sale of gas is by the company to local consumers who are reached by the use of the streets of the city in which the pipes are laid, and through which the gas is conducted to factories and residences as it is required for use. The service is similar to that of a local plant furnishing gas to consumers in the city.

This local service is not of that character which requires general and uniform regulation of rates by Congressional action, and which has always been held beyond the power of the States, although Congress has not legislated upon the subject."

Now, we shall have occasion, from the cases cited in the Pennsylvania case, to see to what extent it lies within the power of a State directly to affect, regulate or burden interstate commerce—and by "burden" is meant anything that imposes either a restrictive or an onerous load upon the commerce—so any taxation is a burden, although the states have the right to tax, still a direct tax on interstate commerce is not permitted, at all,

because it is a direct burden. It may not be a prohibitive or exclusive burden, but it is a burden, and to that extent it falls without the power of the State. It becomes important to consider the exact meaning of this phrase, in differentiating the cases which arise in which interstate commerce is to some extent involved—the cases where the right to burden or affect is denied, and those in which the power of the State is sustained because of local interest, and where Congress had not entered the field. In a case like this, if Congress undertook to regulate the rates for the transportation and sale of gas transported in interstate commerce, as an incident to that it would have a right, undoubtedly, to regulate the intrastate business which was so interwoven with the interstate commerce as to make it a part of it. That is shown by the Minnesota Rate Cases. It was said there that the States had always regulated rates in the States, where it was purely a matter of intrastate commerce, and, while the Government had exercised control over all interstate rates, that it had never entered the field or sought by any regulation or administrative policy to take away from the States the right to control commerce that was purely intrastate; but in the Minnesota Rate Cases, Justice Hughes said that clearly Congress had the right to do that if it signified its intentention—it had the power to do it, and since then that principle has been fully recognized.

In the case of *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, on page 13, this is said:

> "To the same effect, we think, is the case of *Railroad Company* v. *Husen*, 95 U. S. 465, 469, in which it was said that 'Whatever may be the power of a State over commerce that is completely internal, it can no more prohibit and regulate that which is interstate, than it can that which is with foreign nations.' The court, therefore, while conceding the right of the State to enact reasonable inspection laws to prevent the importation of diseased cattle, held the laws of Missouri there under consideration to be invalid, because it prohibited absolutely the introduction of Texas cattle during the time named in the Act, even though they were perfectly healthy and sound.
>
> The court said that a State could not under the cover of exercising its police powers substantially prohibit or burden either foreign or interstate commerce. Reasonable and appropriate laws for the inspection of articles, including food products, were admitted to be valid, but absolute prohibition of an unadulterated, healthy and pure article has never been permitted as a remedy against the importation of that which was adulterated and therefore unhealthy or impure."

I am quoting, because of certain principles that have been laid down, and because I prefer to state them in the language of the Supreme Court, and as indicating what is meant by the cited cases that are applicable to the case before us.

In *Brown* v. *Maryland,* 12 Wheat, 419, l. c. 423, the court said:

> "If Maryland has a right to enact laws of this description, she has a right to regulate her own foreign commerce, although, by the constitution, it is exclusively vested in Congress. The imposition of import duties is often resorted to, not for the purpose of revenue, but to regulate commercial intercourse with foreign countries. Discriminating duties, protective duties, prohibitory duties, are so many commercial regulations. These may all be resorted to under the guise of license laws. If Maryland has a right to pass general license laws, she may pass partial ones; she may select particular commodities and burden their sale with a license duty; she may establish a tariff of discriminating duties for herself and affect, if not defeat, the commercial policy of the country."

In *Heyman* v. *Hays,* 236 U. S. 178, the court says:

> "The right to engage in interstate commerce is not the gift of a state; it cannot be regulated or restrained by a state, nor can a state exclude from its limits a corporation engaged in such commerce."

And the court, in the same case, cited *West* v. *Kansas Natural Gas Company,* 221 U. S. 229, l. c. 260, wherein it was observed:

> "At this late date, it is not necessary to cite cases to show that the right to engage in

> interstate commerce is not the gift of a state, and that it cannot be regulated or restrained by a state, or that a state cannot exclude from its limits a corporation engaged in such commerce."

Now, the Minnesota Rate Cases again have some particular phrases in them that require special notice in this connection. I refer to Minnesota Rate Cases, Volume 230, page 252, in which it is said:

> "Even without action by Congress, the commerce clause of the Constitution necessarily excludes the states from direct control of subjects embraced within the clause which are of such a nature that, if regulated at all, their regulation should be prescribed by single authority. There is thus secured the essential immunity of interstate intercourse from the imposition by the states of direct burdens and restraints."

The court, in the same case, further said, l. c. 396:

> "If a state enactment imposes a direct burden upon interstate commerce, it must fall regardless of Federal legislation. The point of such an objection is not that Congress has acted, but that the state has directly restrained that which in the absence of Federal regulation should be free. If the Acts of Minnesota constitute a direct burden upon interstate commerce, they would be invalid without regard to the exercise of Federal authority touching the interstate rates said to be affected. On the other hand, if the state in the absence of

> Federal legislation would have the power to prescribe the rates here assailed, the question remains whether its action is void as being repugnant to the statute which Congress has enacted."

In the same opinion the court further said, l. c. 399:

> "The grant in the Constitution of its own force—that is, without action by Congress—established the essential immunity of interstate commercial intercourse from direct control of the states with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority. It has repeatedly been declared by this court that as to those subjects which require a general system of uniformity of regulation, the power of Congress is exclusive. In other matters, admitting of diversity of treatment, according to the special requirements of local conditions, states may act within their respective jurisdictions until Congress sees fit to act; and when Congress does act, the exercise of its authority overrides all conflicting legislation.
>
> The principle which determines this classification underlies the doctrine that the states cannot, under any guise, impose direct burdens upon interstate commerce."

In the case of *Wabash* v. *Illinois*, 118 U. S. 557, l. c. 571, the Supreme Court holds that interstate commerce which is national in its character is

subject to regulation by Congress exclusively. The court, in its opinion, said:

> "The line which separates the power of the states from this exclusive power of Congress is not always distinctly marked, and oftentimes it is not easy to determine on which side a particular case belongs. Judges not unfrequently differ in their reasons for a decision in which they concur. Under such circumstances, it would be a useless task to undertake to fix an arbitrary rule by which the line must in all cases be located. It is far better to leave a matter of such delicacy to be settled in each case upon a view of the particular rights involved; but we think it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. * * * The River Mississippi passes through or along the borders of ten different states, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each state was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each state could provide for its own passengers, and regulate the transportation of its own freight, regardless of the interest of others. Nay, more—it could prescribe rules by which the carrier must be governed within the state in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe

> one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. * * *
>
> And it would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the states which was deemed essential to a more perfect union by the framers of the Constitution, if at every stage of the transportation of goods and chattels through the country the state within whose limits a part of this transportation must be done, could impose regulations concerning the price, compensation or taxation, or any other restrictive regulation interfering with and seriously embarrassing this commerce."

Those remarks are thought pertinent in the case at bar. This gas originates in Oklahoma, passes through Kansas and comes into Missouri; and, of course, if the principle contended for by complainant is indulged, there might be, could be, and probably would be such regulation in these various states as in a very prohibitive degree to burden, restrict and embarrass the commerce of this nation.

Now, having it clearly disclosed that this is interstate commerce—and from all that has been said here, and from reading back the reports and decisions upon which the conclusion was based that there can be no direct regulation or burden of strictly interstate commerce by the states—it would seem to be beyond question that the state, here, and its Public Service Commission, has no authority to regulate the rate to be charged for such commerce by the defendant company. Of course, it

is contended that the company has so far subjected itself, by bringing its product into the state, and by doing so through mains and certain instrumentalities that have been established and built for that purpose, that it has voluntarily submitted itself to the jurisdiction of the state, and that, notwithstanding the fact that this is interstate commerce, it is still subject to state regulation.

I cannot indulge the contention that by the contract—by the supply contract which was made between the Kansas City Gas Company and the Kansas Natural Gas Company—that the Kansas Natural Gas Company necessarily or impliedly became a party to the franchise, and, therefore, subject to the control of the state. It never has been my opinion that that was the effect of that contract. It was simply that the Kansas City Gas Company, when that franchise was granted, was required by the city to disclose the source of its supply, so that the city would be apprised where it could get the gas, and upon what terms it could get it; but there never has been any contractual relation between the Kansas Natural Gas Company and Kansas City, and there never has been anything involved in the franchise which imposes a necessary duty upon the Kansas Natural, of which the city could avail itself directly, but simply it was known that the gas was to be procured from the Kansas Natural and its predecessors, and, necessarily, the city recognized that the company had to have some way to make the connections, whereby that supply could be effective; and in the Pennsylvania case, by means of transportation through the state and

into the state, that feature was far more pronounced than in this case; yet there was no disposition by the Supreme Court in that case to recognize that for that reason the Gas Company had placed itself within the jurisdiction of the state authorities.

Now, it is very probable, of course, that this is a commodity that should, in some way, be regulated. As the Supreme Court has said, that is a matter confided to the Federal Congress. There is no doubt that these gas companies, furnishing gas throughout the United States, should have some body that may exercise control over them; but I am compelled to stand for what I believe the law has been disclosed to be, that the power of direct regulation of interstate commerce, whether Congress has entered the field or not, cannot be and is not lodged in the state. The fact that indirectly at the end of this interstate commerce local interests are affected is not decisive of the question. It is necessary that this company, itself, must have intervened in local affairs, as an instrumentality taking part in the distribution and operation of the affairs connected with that commerce, before local jurisdiction can be conferred.

This answers the question of "reasonableness" which has been raised; and we are compelled to come to the conclusion that under the rules announced by the court, any direct burden or regulation upon commerce which is distinctly interstate is unreasonable.

Judge Pollock, in the District of Kansas, in the case of *Central Trust Company* v. *Consumers*

Light, Heat and Power Company, in which was involved the right of the Kansas Natural Gas Company to increase its rates in Kansas without the consent of the Public Utilities Commission of that state, came to the same conclusion as that announced in this opinion.

I am compelled to conclude, therefore, that the injunction prayed must be denied.

In the District Court of the United States for the District of Kansas, First Division.

Central Trust Company of New York, Complainant,

vs. No. 75 N Equity.

Consumers Light, Heat and Power Company, Defendant,

The State of Kansas on Relation A. E. Helm, Attorney for the Public Utilities Commission for the State of Kansas, Intervener.

MEMORANDA OF DECISION ON QUESTION OF LAW.

The single question now presented to the court for decision in this suit is this, namely: Is the business done by the Kansas Natural Gas Company (hereinafter called the "Natural Company"), a Delaware corporation, engaged in the business of producing and buying natural gas, mostly in the state of Oklahoma, also in this state, and transporting the same through pipe lines in this state and through this state into the state of Missouri and delivering the same to distributing companies to be delivered by said companies to their customers, in its nature such business as is under the control and subject to the regulation of the Public Utilities Commission of the State of Kansas in the matter of rates or price per thousand cubic feet which may be charged by the Natural Company for the gas so transported, sold and

furnished the distributing companies at the intake of said distributing companies' lines at the gates of the cities?

This question arises and is now presented for determination in the following manner:

One G. J. Swan is the receiver, duly appointed, in the above entitled and numbered suit in this court, over the property and assets of defendant, the Consumers Light, Heat & Power Company, a corporation, created for the purpose of furnishing light, heat and power to the city of Topeka and its inhabitants in this state and the adjoining town of Oakland. Said receiver was through the gas system of defendant Light, Heat & Power Company engaged in the business of so furnishing gas at the time this litigation arose. The only source of supply of natural gas which said receiver has or can procure is from the Natural Company. The rate fixed and price charged by the Natural Company prior to the first day of April this present year for gas furnished and delivered to said receiver at the city gate was the sum of thirty-five cents per thousand cubic feet. However, on April 1st said receiver was by the Natural Company notified, as follows:

"Kansas Natural Gas Company.
Bartlesville, Oklahoma,
April 1, 1922.

Consumers Light, Heat & Power Co.,
Topeka, Kansas.

Gentlemen:

You are hereby notified that on and after April, 1922, meter reading you will be charged at the rate of forty cents per thou-

sand cubic feet for all gas delivered to you at the town border measuring station, gas to be computed on a temperature basis of sixty degrees Fahrenheit, and a pressure basis of eight ounces atmospheric pressure, atmospheric pressure being assumed to be 14.40 pounds per square inch.

Very truly yours,

KANSAS NATURAL GAS CO.,
By H. L. MONTGOMERY."

This same proposed increase in rates from thirty-five to forty cents per thousand cubic feet was made as to all cities and towns of this state without presentation of the right to do so to the Public Utilities Commission of this state, or receiving any authority from that source. Thereupon, the receiver of defendant Consumers Light, Heat & Power Company filed in this suit his complaint praying an injunction against the Natural Company restraining said company from charging the proposed rate of forty cents per thousand cubic feet on the ground said rate was confiscatory in view of the only rate it is by the Public Utilities Commission allowed to charge its customers.

Thereupon, a restraining order was granted the receiver, and the Public Utilities Commission, through its solicitor, in the name of the state, intervened herein, praying an injunction against the Natural Company restraining it from charging or collecting from any distributing company located in this state said increase in price of gas from thirty-five to forty cents a thousand cubic feet,

on the ground such proposed increase or charge for gas is unlawful and void because not authorized by the Public Utilities Commission of this state.

Thus is raised the issue of the power, jurisdiction and control of the Public Utilities Commission of this state over the business done by the Natural Company within this state.

Coming now to the consideration of this question, it may be said: The Natural Company owns and exercises no franchise rights in this state acquired from the state or any of its municipal bodies. It is a foreign corporation owning a pipe line system and is producing or purchasing gas in Oklahoma, this state, and transporting it from Oklahoma into and through this state into the state of Missouri, and delivering the same to some forty odd local gas companies holding franchises from the several cities in which they are located for the distribution and sale of natural gas therein. In the transaction of its business the Natural Company is engaged solely and alone in interstate commerce business within this state and does no local business whatever. This is conceded. The local companies to which the Natural Company sells its gas do a purely local business, hence, unquestionably are subject to the jurisdiction and control of the Public Utilities Commission of this state so far as located within this state. The question, however, is as to that business which is transacted by the Natural Company. This question, I find, has been presented to and received consideration from the Supreme Court in

the case of *Public Utilities Commission* v. *Landon*, 249 U. S. 236, wherein Mr. Justice McReynolds, delivering the opinion for the court, said, in speaking of the business conducted by the Natural Company, as follows:

> "The court below held the business carried on by the receivers—transportation of natural gas and its disposition and sale to consumers through the distributing companies—was interstate commerce of a national character; that the commissions' actions interfered with establishment and maintenance of reasonable sale rates and thereby burdened interstate commerce and took the receivers' property without due process of law; that the original supply contracts were not binding upon the receivers. And it accordingly enjoined the commissions, their members, the attorneys general of both states, the various municipalities and the distributing companies from interfering with establishment of such reasonable and compensatory rates as the court might approve.
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> * * * * * *
>
> That the transportation of gas through pipe lines from one state to another is interstate commerce may not be doubted. Also, it is clear that as part of such commerce the receivers might sell and deliver gas so transported to local distributing companies free from unreasonable interference by the state. *American Express Co.* v. *Iowa*, 196 U. S. 133; *Oklahoma* v. *Kansas Natural Gas Co.*, 221 U. S. 229; *Haskell* v. *Kansas Natural Gas Co.*, 224 U. S. 217.
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> * * * * * *
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> Interstate commerce is a practical conception and what falls within it must be deter-

> mined upon consideration of established facts and known commercial methods. *Rearick* v. *Pennsylvania*, 203 U. S. 507, 512; *The Pipe Line Cases*, 234 U. S. 548, 560. The thing which the receivers actually did was to deliver supplies to local companies. Exercising franchise rights, the latter distributed and sold the commodity so obtained upon their own account and paid the receivers what amounted to two-thirds of their receipts from customers. Interstate movement ended when the gas passed into local mains."

The business then being conducted by the receiver of the Natural Company differed from that now being conducted by the Natural Company in the fact that the gas transported by the Natural Company in that case was turned over to and distributed by the local gas companies under divisional orders of proceeds, whereas, in the present case the gas is sold outright and delivered to the distributing companies at the city gates. This fact more strongly disassociates the Natural Company from any local business whatever.

The case of *Penna. Gas. Co.* v. *Pub. Service Comm.*, 252 U. S. 23, is much relied upon by those insisting upon control of the business by the Public Utilities Commission. That was a case in which the Pennsylvania Company was engaged in both the interstate business of transporting natural gas from Pennsylvania into the State of New York for sale, and, also, under certain franchise rights granted to it by the City of Jamestown, New York, was distributing and delivering the gas to its customers at the burners' tips in the city.

Mr. Justice Day, delivering the opinion of the court, and distinguishing that case from the Landon case, said:

> "We think that the transmission and sale of natural gas produced in one State, transported by means of pipelines and directly furnished to consumers in another State, is interstate commerce within the principles of the cases already determined by this court. *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229; *Haskell* v. *Kansas Natural Gas Co.*, 224 U. S. 217; *Western Union Telegraph Co.* v. *Foster*, 247 U. S. 105.
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> This case differs from *Public Utilities Commission* v. *Landon*, 249 U. S. 236, wherein we dealt with the piping of natural gas from one State to another, and its sale to independent local gas companies in the receiving State, and held that the retailing of gas by the local companies to their consumers was intrastate commerce and not a continuation of interstate commerce, although the mains of the local companies receiving and distributing the gas to local consumers were connected permanently with those of the transmitting company. Under the circumstances set forth in that case we held that the intersate movement ended when the gas passed into the local mains; that the rates to be charged by the local companies had but an indirect effect upon interstate commerce and, therefore, the matter was subject to local regulation."

Now the contention of those here seeking to have the business of the Natural Company controlled by the Public Utilities Commission of the

State under State laws, is this: As the Federal Government has not attempted to exercise that exclusive control over the interstate business of the Natural Company which the commerce clause of the Federal Constitution confers upon it, therefore the State, through its Public Utilities Commission, may exercise that control so conferred on the Government under the commerce clause until the Federal Government takes over such control. However, it is quite well settled by authority although the business transacted be in its essential nature interstate, yet, so long as the General Government has not exercised its power conferred to regulate such commerce, the State may in incidental ways and manners impress restrictions upon interstate commerce. This is no place more aptly stated than by Mr. Justice Day in distinguishing the Landon case from the Pennsylvania Gas case then at bar, in which it is said, as follows:

> "The general principle is well established and often asserted in the decisions of this court that the State may not directly regulate or burden interstate commerce. That subject, so far as legislative regulation is concerned, has been committed by the Constitution to the control of the Federal Congress. But while admitting this general principle, it, like others of a general nature, is subject to qualifications not inconsistent with the general rule, which now are as well established as the principle itself.
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> In dealing with interstate commerce it is not in some instances regarded as an infringement upon the authority delegated to Congress, to permit the States to pass laws in-

directly affecting such commerce, when needed to protect or regulate matters of local interest. Such laws are operative until Congress acts under its superior authority by regulating the subject-matter for itself. In varying forms this subject has frequently been before this court. The previous cases were fully reviewed and deductions made therefrom in the Minnesota Rate Cases, 230 U. S. 352. The paramount authority of Congress over the regulation of interstate commerce was again asserted in those cases. It was nevertheless recognized that there existed in the States a permissible exercise of authority, which they might use until Congress had taken possession of the field of regulation," etc.

However, the control which the Public Utilities Commission of the State here asserts over the business done by the Natural Company within this State is in no sense, manner or way incidental in its nature under the law creating the Commission, but is full, absolute and complete regulation and control over the interstate business of the Natural Company, precisely the same in its nature as it holds and exercises over the business of the local distributing companies, even to the extent of establishing the prices to be charged for what it transports into the State in interstate commerce and here sells at wholesale prices.

It has often declared no more complete control can be exercised over interstate business. See *Heyman* v. *Hayes,* 236 U. S. 178; The Pipe Line Cases, 234 U. S. 548; *Brown* v. *Maryland,* 12 Wheaton 419; *American Express Co.* v. *Iowa;*

Minnesota v. *Barber*, 136 U. S. 313; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, and many other cases.

From all of which, I am persuaded beyond doubt, so long as we have the guaranty of protection afforded and intended to be afforded by the framers of our National Constitution against the complete regulation and control of purely interstate commerce under the commerce clause of the Constitution, such regulation as is here sought by the State through its Public Utilities Commissions over the purely interstate business of the Natural Company cannot and should not be permitted.

It follows, the power and control attempted to be exercised by the State through its Public Utilities Commission over the interstate business of the National Company must be denied, and is denied.